

THE GENERAL STATUTES OF NORTH CAROLINA

ANNOTATED

1994 CUMULATIVE SUPPLEMENT

Volume 2

Chapters 1A through 7A

Prepared under the Supervision of

**The Department of Justice
of the State of North Carolina**

BY

The Editorial Staff of the Publishers

Under the Direction of

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Annotated through 443 S.E.2d 468. For complete scope of
annotations, see scope of volume page.

**Place Behind Supplement Tab in Binder Volume.
This Supersedes Previous Supplement, Which
May Be Retained for Reference Purposes.**

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Preface

This Cumulative Supplement to Volume 2 contains the general laws of a permanent nature enacted by the General Assembly through the 1993 (Reg. Sess., 1994) Session, which are within the scope of such volume, and brings to date the annotations included therein.

Amendments are inserted under the same section numbers appearing in the General Statutes, and new laws appear under the proper chapter headings.

Chapter analyses show all affected sections, except sections for which catchlines are carried for the purpose of notes only. An index to all statutes codified herein will appear in the Replacement Index Volumes.

A majority of the Session Laws are made effective upon ratification, but a few provide for stated effective dates. If the Session Law makes no provision for an effective date, the law becomes effective under G.S. 120-20 "from and after 30 days after the adjournment of the session" in which passed.

Beginning with the opinions issued by the North Carolina Attorney General on July 1, 1969, any opinion which construes a specific statute is cited as an annotation to that statute. For a copy of an opinion or of its headnotes write the Attorney General, P.O. Box 629, Raleigh, N.C. 27602.

The members of the North Carolina Bar are requested to communicate any defects they may find in the General Statutes or in this Cumulative Supplement and any suggestions they may have for improving the General Statutes, to the Department of Justice of the State of North Carolina, or to the Michie Company, Law Publishers, Charlottesville, Virginia.

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User's Guide

In order to assist both the legal profession and the layperson in obtaining the maximum benefit from the North Carolina General Statutes, a User's Guide has been included in Volume 1. This guide contains comments and information on the many features found within the General Statutes intended to increase the usefulness of this set of laws to the user. See Volume 1 for the complete User's Guide.

Scope of Volume

Statutes:

Permanent portions of the General Laws enacted by the General Assembly through the 1993 (Reg. Sess., 1994) Session affecting Chapters 1A through 7A of the General Statutes.

Annotations:

Sources of the annotations to the General Statutes appearing in this volume are:

- North Carolina Reports through Volume 336, p. 77.
- North Carolina Court of Appeals Reports through Volume 114, p. 505.
- South Eastern Reporter 2nd Series through Volume 443, p. 468.
- Federal Reporter 3rd Series through Volume 21, p. 1127.
- Federal Supplement through Volume 848, p. 212.
- Federal Rules Decisions through Volume 154, p. 535.
- Bankruptcy Reports through Volume 166, p. 498.
- Supreme Court Reporter through Volume 114, p. 1877.
- North Carolina Law Review through Volume 72, p. 1128.
- Wake Forest Law Review through Volume 29, p. 646.
- Campbell Law Review through Volume 16, p. 145.
- Duke Law Journal through Volume 43, p. 1348.
- North Carolina Central Law Journal through Volume 20, p. 229.
- Opinions of the Attorney General.

The General Statutes of North Carolina 1994 Cumulative Supplement

VOLUME 2

Chapter 1A.

Rules of Civil Procedure.

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Commencement of Action; Service of Process, Pleadings, Motions, and Orders.

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Rule

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§ 1A-1. Rules of Civil Procedure.

ARTICLE 1.

Scope of Rules—One Form of Action.

Rule 1. Scope of rules.

CASE NOTES

Cited in *In re Greene*, 328 N.C. 639,
403 S.E.2d 257 (1991).

Rule 2. One form of action.

CASE NOTES

I. In General.

I. IN GENERAL.

Applied in *Pugh v. Pugh*, 111 N.C.
App. 118, 431 S.E.2d 873 (1993).

Cited in *Morrow v. Morrow*, 103 N.C.
App. 787, 407 S.E.2d 286 (1991).

ARTICLE 2.

Commencement of Action; Service of Process, Pleadings, Motions, and Orders.

Rule 3. Commencement of action.

CASE NOTES

I. In General.

I. IN GENERAL.

Expiration of Time Extension. — When plaintiffs failed to file their complaint before the extension of time expired, their action abated, and the three-year statute of limitations had run. The trial court could not extend their time in which to file their complaint under N.C.R.Civ.P., Rule 6(b) thus reviving the original action and avoiding the statute of limitations. *Osborne v. Walton*, 110 N.C. App. 850, 431 S.E.2d 496 (1993).

A voluntary dismissal of negligence action without prejudice did not toll the statute of limitations in a case in which the plaintiff, seeing the statute of limitations about to run out, received an order extending the time for filing a complaint but failed to serve defendant with civil summons and the order. The defective service of process discontinued plaintiff's original action, and the trial court properly treated the vol-

untary dismissal as if it had never been filed and the statute of limitations as if it had not been tolled. Plaintiff's second complaint, therefore, constituted a new action which plaintiff failed to file within the three years required by the statute of limitations. *Latham v. Cherry*, 111 N.C. App. 871, 433 S.E.2d 478 (1993), cert. denied, 335 N.C. 556, 441 S.E.2d 116 (1994).

Applied in *Chaplain v. Chaplain*, 101 N.C. App. 557, 400 S.E.2d 121 (1991).

Stated in *Saied v. Bradshaw*, 110 N.C. App. 855, 431 S.E.2d 233 (1993).

Cited in *Morrow v. Morrow*, 103 N.C. App. 787, 407 S.E.2d 286 (1991); *Lusk v. Crawford Paint Co.*, 106 N.C. App. 292, 416 S.E.2d 207 (1992); *Clark v. Velsicol Chem. Corp.*, 110 N.C. App. 803, 431 S.E.2d 227 (1993); *Food Serv. Specialists v. Atlas Restaurant Mgt., Inc.*, 111 N.C. App. 257, 431 S.E.2d 878 (1993); *In re Estate of Neisen*, 114 N.C. App. 82, 440 S.E.2d 855 (1994).

Rule 4. Process.

CASE NOTES

I. In General.

II. Personal Service on Natural Persons.

A. In General.

V. Service by Publication.

VII. Discontinuance and Extensions.

I. IN GENERAL.

Summons Must Be Served Within 30 Days. — Under this rule, a summons must be served within 30 days of its issuance. *Dozier v. Crandall*, 105 N.C. App. 74, 411 S.E.2d 635, cert. denied, 332 N.C. 480, 420 S.E.2d 826 (1992).

Where summons is not served within the statutory period, etc. —

A summons not served within 30 days

loses its vitality and becomes functus officio, and service obtained thereafter does not confer jurisdiction on the trial court over the defendant. *Dozier v. Crandall*, 105 N.C. App. 74, 411 S.E.2d 635, cert. denied, 332 N.C. 480, 420 S.E.2d 826 (1992).

Although a summons not served within 30 days becomes dormant and unservable, under Rule 4(c) it is not invalidated nor is the action discontinued.

Dozier v. Crandall, 105 N.C. App. 74, 411 S.E.2d 635, cert. denied, 332 N.C. 480, 420 S.E.2d 826 (1992).

Irregularity in Summons. — Where there was no confusion as to the identity of the actual defendant, as evidenced by the complaint and the caption of the summons, a slight irregularity was not fatal because the summons was properly directed to the city, and the city was properly named as the defendant. Steffey v. Mazza Constr. Group, Inc., 113 N.C. App. 538, 439 S.E.2d 241 (1994).

Neglect Required for Appointment of Private Process Server. — Something more than mere failure to act is needed for conduct to constitute neglect under paragraph (h) of this rule. Williams v. Williams, 113 N.C. App. 226, 437 S.E.2d 884 (1994).

Defense of Insufficient Service on "John Doe" Defendant Not Available to Insurance Company. — Where respondent was provided with appropriate notice of the action below, it could not attempt to defend its prior election not to provide a defense to a John Doe defendant by alleging that service of process on "John Doe" was insufficient. Sparks v. Nationwide Mut. Ins. Co., 99 N.C. App. 148, 392 S.E.2d 415 (1990).

Issuance of Second Summons. — Although summons was not properly issued at first, the issuance of a second summons commenced a new action on the date it was issued. Duncan v. Duncan, 102 N.C. App. 107, 401 S.E.2d 398 (1991).

60 Day "Saving Provision" in subdivision (j2)(2). — A careful review of this saving provision indicates it is limited in scope and may only be employed where: (1) the original service was made by registered or certified mail upon a person residing in the addressee's dwelling house or usual place of abode; and (2) it later appears "the person who received the receipt at the addressee's dwelling house or usual place of abode was not a person of suitable age and discretion residing therein." Hanover Ins. Co. v. Amana Refrigeration, Inc., 106 N.C. App. 79, 415 S.E.2d 99, cert. denied, 332 N.C. 344, 421 S.E.2d 147 (1992).

Applied in In re Adoption of P.E.P., 100 N.C. App. 191, 395 S.E.2d 133 (1990); Warzynski v. Empire Comfort Sys., 102 N.C. App. 222, 401 S.E.2d 801 (1991); In re P.E.P., 329 N.C. 692, 407 S.E.2d 505 (1991); Transtector Sys. v.

Electric Supply, Inc., 113 N.C. App. 148, 437 S.E.2d 699 (1993).

Quoted in Williamson v. Savage, 104 N.C. App. 188, 408 S.E.2d 754 (1991).

Stated in Taylor v. Brinkman, 108 N.C. App. 767, 425 S.E.2d 429 (1993).

Cited in Lusk v. Crawford Paint Co., 106 N.C. App. 292, 416 S.E.2d 207 (1992); Nissan Div. of Nissan Motor Corp. in United States v. Nissan, 111 N.C. App. 748, 434 S.E.2d 224 (1993); In re Baby Boy Dixon, 112 N.C. App. 248, 435 S.E.2d 352 (1993); Storey v. Hailey, 114 N.C. App. 173, 441 S.E.2d 602 (1994).

II. PERSONAL SERVICE ON NATURAL PERSONS.

A. In General.

Rebuttable Presumption, etc. —

When the officer's return of the summons shows legal service a presumption of valid service of process is created. Greenup v. Register, 104 N.C. App. 618, 410 S.E.2d 398 (1991).

Actions Constituting Effectual Service. —

Evidence was sufficient to find that the plaintiff exercised due diligence in attempting to ascertain the address or whereabouts of defendant where plaintiff's counsel attempted service at two available addresses, consulted the local telephone directory and the department of motor vehicles to obtain information, contacted the defendant's insurer and attorney seeking information as to defendant's whereabouts and finally wrote the California Department of Motor Vehicles based on a statement by defendant's sister that he was "out west, possibly California." Winter v. Williams, 108 N.C. App. 739, 425 S.E.2d 458 (1993).

V. SERVICE BY PUBLICATION.

Publication in County Where Action Is Pending. — Whereas defendant's last known address was in Wake County and despite reasonable efforts, plaintiff had "no reliable information" as to the defendant's whereabouts, publication was proper in the county in which the action was pending. Winter v. Williams, 108 N.C. App. 739, 425 S.E.2d 458 (1993).

VII. DISCONTINUANCE AND EXTENSIONS.

Extensions, Generally. —

This rule specifically provides that

where there is neither endorsement nor issuance of alias or pluries summons within 90 days after issuance of the last preceding summons, the action is discontinued as to any defendant not served within the time allowed and treated as if it had never been filed. *Dozier v. Crandall*, 105 N.C. App. 74, 411 S.E.2d 635, cert. denied, 332 N.C. 480, 420 S.E.2d 826 (1992).

"Discontinuance" is a term of art whose only application in the context of service of process is to an action that must cease for failure of the party to comply with section (d) of this rule. Thereafter a new action may be filed, but the date for purposes of the statute of limitations is that of the later filing. *Snead v. Foxx*, 329 N.C. 669, 406 S.E.2d 829 (1991).

Discontinuance on Failure to Secure Extension of Time for Service.

— Where plaintiff, presented with the return of her summons unserved, failed to continue her action by securing an endorsement upon the original summons for an extension of time within which to complete service of process pursuant to subsection (d)(1) of this rule, and did not sue out an alias or pluries summons returnable in the same manner as the

original process pursuant to subsection (d)(2), the plaintiff's action was consequently discontinued 90 days after the date the original summons was issued. *Snead v. Foxx*, 329 N.C. 669, 406 S.E.2d 829 (1991), holding that plaintiff's action was barred by the statute of limitations.

Allowance of Voluntary Dismissal Held Nugatory. —

A voluntary dismissal of negligence action without prejudice did not toll the statute of limitations in a case in which the plaintiff, seeing the statute of limitations about to run, received an order extending the time for filing a complaint but failed to serve defendant with civil summons and the order. The defective service of process discontinued plaintiff's original action, and the trial court properly treated the voluntary dismissal as if it had never been filed and the statute of limitations as if it had not been tolled. Plaintiff's second complaint, therefore, constituted a new action which plaintiff failed to file within the three years required by the statute of limitations. *Latham v. Cherry*, 111 N.C. App. 871, 433 S.E.2d 478 (1993), cert. denied, 335 N.C. 556, 441 S.E.2d 116 (1994).

OPINIONS OF ATTORNEY GENERAL

Summary Ejectment Proceedings.

— Because § 7A-217(4) states that the procedure found in § 42-29 can be used in summary ejectment cases only, and because summary ejectment is in the nature of an in rem proceeding, an in personam money damages claim cannot be heard and a money judgment cannot be entered in an action where service of process is effected through the alterna-

tive method under § 42-29. The requirements for actual service of process found elsewhere in G.S. § 7A-213 and in this rule would still apply to the claim for rents and other money damages. See opinion of Attorney General to Hon. Thomas N. Hix, Chief District Court Judge, 29th Judicial Circuit, 60 N.C.A.G. 95 (1992).

Rule 5. Service and filing of pleadings and other papers.

(a) *Service — When required.* — Every order required by its terms to be served, every pleading subsequent to the original complaint unless the court otherwise orders because of numerous defendants, every paper relating to discovery required to be served upon a party unless the court otherwise orders, every written motion other than one which may be heard ex parte, and every written notice, appearance, demand, offer of judgment and similar paper shall be served upon each of the parties, but no service need be made on parties in default for failure to appear except that pleadings asserting new or additional claims for relief against them shall be served upon them in the manner provided for service of summons in Rule 4.

(b) *Service — How made.* — A pleading setting forth a counterclaim or cross claim shall be filed with the court and a copy thereof shall be served on the party against whom it is asserted or on his attorney of record. With respect to all pleadings subsequent to the original complaint and other papers required or permitted to be served, service with due return may be made in the manner provided for service and return of process in Rule 4 and may be made upon either the party or, unless service upon the party himself is ordered by the court, upon his attorney of record. With respect to such other pleadings and papers, service upon the attorney or upon a party may also be made by delivering a copy to him or by mailing it to him at his last known address or, if no address is known, by filing it with the clerk of court. Delivery of a copy within this rule means handing it to the attorney or to the party; or leaving it at the attorney's office with a partner or employee. Service by mail shall be complete upon deposit of the pleading or paper enclosed in a post-paid, properly addressed wrapper in a post office or official depository under the exclusive care and custody of the United States Postal Service.

(c) *Service — Numerous defendants.* — In any action in which there are unusually large numbers of defendants, the court, upon motion or of its own initiative, may order that service of the pleadings of the defendants and replies thereto need not be made as between the defendants and that any crossclaim, counterclaim, or matter constituting an avoidance or affirmative defense contained therein shall be deemed to be denied or avoided by all other parties and that the filing of any such pleading and service thereof upon the plaintiff constitutes due notice of it to the parties. A copy of every such order shall be served upon the parties in such manner and form as the court directs.

(d) *Filing.* — All pleadings subsequent to the complaint shall be filed with the court. All other papers required to be served upon a party, including requests for admissions, shall be filed with the court either before service or within five days thereafter, except that depositions, interrogatories, requests for documents, and answers and responses to those requests may not be filed unless ordered by the court or until used in the proceeding. The party taking a deposition or obtaining material through discovery is responsible for its preservation and delivery to the court if needed or so ordered. With respect to all pleadings and other papers as to which service and return has not been made in the manner provided in Rule 4, proof of service shall be made by filing with the court a certificate either by the attorney or the party that the paper was served in the manner prescribed by this rule, or a certificate of acceptance of service by the attorney or the party to be served. Such certificate shall show the date and method of service or the date of acceptance of service.

(e)(1) *Filing with the court defined.* — The filing of pleadings and other papers with the court as required by these rules shall be made by filing them with the clerk of the court, except that the judge may permit the papers to be filed with him, in which event he shall note thereon the filing date and forthwith transmit them to the office of the clerk.

(2) *Filing by telefacsimile transmission.* — If, pursuant to G.S. 7A-34 and G.S. 7A-343, the Supreme Court and the Administrative Officer of the Courts establish uniform rules,

regulations, procedures and specifications for the filing of pleadings or other court papers by telefacsimile transmission, filing may be made by the transmission when, in the manner, and to the extent provided therein. (1967, c. 954, s. 1; 1971, c. 538; c. 1156, s. 2.5; 1975, c. 762, s. 1; 1983, c. 201, s. 1; 1985, c. 546; 1991, c. 168, s. 1.)

Effect of Amendments. — The 1991 amendment, effective May 30, 1991, in subsection (e) designated the first paragraph as subdivision (1) and added subdivision (2).

CASE NOTES

Cited in Dobos v. Dobos, 111 N.C. App. 222, 431 S.E.2d 861 (1993). Human Resources, 98 N.C. App. 675, 392 S.E.2d 113 (1990).
Gummels v. North Carolina Dep't of

Rule 6. Time.

CASE NOTES

- I. In General.
- II. Enlargement of Time.
- IV. Service of Motions and Affidavits.
- V. Additional Time after Service by Mail.

I. IN GENERAL.

Applied in Johnson v. Hutchens, 103 N.C. App. 384, 405 S.E.2d 597 (1991); Hackett v. Bonta, 113 N.C. App. 89, 437 S.E.2d 687 (1993); Evans v. Full Circle Prods., Inc., 114 N.C. App. 777, 443 S.E.2d 108 (1994).

Cited in Huntington Manor v. North Carolina Dep't of Human Resources, 99 N.C. App. 52, 393 S.E.2d 104 (1990); Chaplain v. Chaplain, 101 N.C. App. 557, 400 S.E.2d 121 (1991); Crowell Constructors, Inc. v. State ex rel. Cobey, 114 N.C. App. 75, 440 S.E.2d 848 (1994).

II. ENLARGEMENT OF TIME.

Failure to File Within Extended Time. — Where plaintiffs filed for an extension of time to file their complaint for medical malpractice and loss of consortium, which the court granted, but plaintiffs did not file their complaint until 19 days later, when plaintiffs failed to file their complaint before the extension of time expired, their action abated, and the three-year statute of limitations had run. The trial court could not extend the time in which to file their complaint under section (b) of this Rule, thus reviving the original action and avoiding the statute of limita-

tions. Osborne v. Walton, 110 N.C. App. 850, 431 S.E.2d 496 (1993).

IV. SERVICE OF MOTIONS AND AFFIDAVITS.

Section (d) of this rule relates only to the hearing of motions. In re Estate of Tucci, 104 N.C. App. 142, 408 S.E.2d 859 (1991), cert. dismissed, 331 N.C. 748, 417 S.E.2d 236 (1992).

Extension of Time for Filing Affidavits Supporting Summary Judgment. — Despite the specific language of § 1A-1, Rule 56(c) requiring affidavits to be filed prior to the day of hearing, the trial court may in some instances permit the filing of the affidavits at a later time. If a request for permission to file affidavits at some later time is made before the date of the summary judgment hearing, the trial court may in its discretion order the period for filing affidavits to be enlarged. Battle v. Nash Technical College, 103 N.C. App. 120, 404 S.E.2d 703 (1991).

Filing of Affidavits on Day of Summary Judgment Hearing. — If a request for permission to file affidavits in support of a motion under § 1A-1, Rule 56 is made on the day of the summary judgment hearing, the trial court may permit the act to be done where the failure to act was the result of excusable

neglect. *Battle v. Nash Technical College*, 103 N.C. App. 120, 404 S.E.2d 703 (1991).

Where there was no request for enlargement of time within which to file and serve any affidavits made by the plaintiff prior to the day of the hearing of the motion on summary judgment and there was no finding or a request by the plaintiff for a finding of excusable neglect in failing to serve the affidavits prior to the date of the summary judgment hearing, because the plaintiff failed to proceed in a manner that would permit the trial court to exercise its discretion to permit the filing of plaintiff's proffered affidavit, the plaintiff could not on appeal complain about its exclusion. *Battle v. Nash Technical College*, 103 N.C. App. 120, 404 S.E.2d 703 (1991).

V. ADDITIONAL TIME AFTER SERVICE BY MAIL.

Editor's Note. — *The annotation under the catchline "Section (e) Held Inapplicable" in the main volume under this section should read:*

Section (e) Held Inapplicable. — Plaintiff's motions for entry of default and default judgment, which were filed

31 days after service of summons and complaint on defendant, were made after defendant's time to answer had expired, as although summons and complaint were served upon defendant by mail, section (e) of this rule did not apply to extend his time to answer to 33 days, because the 30 days defendant had under § 1A-1, Rule 12 to answer the complaint began running when defendant was served with the summons and complaint, not when plaintiff mailed it. *Williams v. Moore*, 95 N.C. App. 601, 383 S.E.2d 416 (1989).

No Reversible Error Where Defendants Not Prejudiced by Untimely Notice. — Trial court did not commit reversible error in granting summary judgment in favor of plaintiff although plaintiff failed to give timely notice to appellants of said motion pursuant to section (e) of this rule and § 1A-1, Rule 56(c). Plaintiff conceded that the Notice of the Summary Judgment Hearing was served by mail only nine days prior to the hearing instead of 13 days as required; however, defendants failed to demonstrate any prejudice caused them by the untimely notice. *Symons Corp. v. Quality Concrete Constr., Inc.*, 108 N.C. App. 17, 422 S.E.2d 365 (1992).

ARTICLE 3.

Pleadings and Motions.

Rule 7. Pleadings allowed; form of motions.

CASE NOTES

I. In General.

III. Motions and Other Papers.

I. IN GENERAL.

Applied in *Tay v. Flaherty*, 100 N.C. App. 51, 394 S.E.2d 217 (1990).

Stated in *Johnson v. North Carolina DOT*, 107 N.C. App. 63, 418 S.E.2d 700 (1992).

Cited in *Curtis v. Curtis*, 104 N.C. App. 625, 410 S.E.2d 917 (1991); *Kaplan v. Prolife Action League*, 111 N.C. App. 1, 431 S.E.2d 828 (1993); *Crowell Constructors, Inc. v. State ex rel. Cobey*, 114 N.C. App. 75, 440 S.E.2d 848 (1994).

III. MOTIONS AND OTHER PAPERS.

Waiver of Notice. — Where the con-

tent of plaintiff's notice of hearing to modify custody, seeking "such relief as to the court may seem just and proper," was insufficient to comply with the requirement that the motion state the grounds therefor and the relief or order sought, but defendant's attorney failed to object, defendant waived proper notice of plaintiff's motion to modify custody. *Dobos v. Dobos*, 111 N.C. App. 222, 431 S.E.2d 861 (1993).

Name and Number of Rule, etc. —

While failure to give the number of the rule under which a motion is made is not necessarily fatal, the grounds for the motion and the relief sought must be

consistent with the Rules of Civil Procedure. *Gallbrunner v. Mason*, 101 N.C. App. 362, 399 S.E.2d 139, cert. denied, 329 N.C. 268, 407 S.E.2d 835 (1991), appeal dismissed, 333 N.C. 167, 399 S.E.2d 139 (1992).

Trial court erred in granting a motion captioned "Motion to Forfeit Security Deposit" in a landlord-tenant dispute, where the motion was in essence an attempt to amend the complaint, which made no reference to a security deposit, and judgment had been entered in the case. *Gallbrunner v.*

Mason, 101 N.C. App. 362, 399 S.E.2d 139, cert. denied, 329 N.C. 268, 407 S.E.2d 835 (1991), appeal dismissed, 333 N.C. 167, 399 S.E.2d 139 (1992).

Timeliness of Responsive Pleading. — Although plaintiff had no right to file a responsive pleading to the answer under this rule, plaintiff did have a continuing duty to review the appropriateness of persisting in litigating a claim which was alleged to be time-barred. *Sunamerica Fin. Corp. v. Bonham*, 328 N.C. 254, 400 S.E.2d 435 (1991).

Rule 8. General rules of pleadings.

CASE NOTES

- I. In General.
- II. Pleadings, Generally.
- III. Affirmative Defenses.

I. IN GENERAL.

Taken together, § 1A-1, Rule 12(b)(6) and section (a) of this rule suggest pleadings should be limited to those facts or descriptions of transactions, occurrences, or series of transactions or occurrences, intended to be proved. *Bowlin v. Duke Univ.*, 108 N.C. App. 145, 423 S.E.2d 320 (1992), cert. denied, 333 N.C. 461, 427 S.E.2d 618 (1993).

Applied in *Oxendine v. Bowers*, 100 N.C. App. 712, 398 S.E.2d 57 (1990); *Wallace v. Haserick*, 105 N.C. App. 315, 412 S.E.2d 694 (1992); *Dunleavy v. Yates Constr. Co.*, 106 N.C. App. 146, 416 S.E.2d 193 (1992).

Stated in *Johnson v. North Carolina DOT*, 107 N.C. App. 63, 418 S.E.2d 700 (1992); *United States v. Real Property*, 814 F. Supp. 468 (W.D.N.C. 1993).

Applied in *Miller v. Talton*, 112 N.C. App. 484, 435 S.E.2d 793 (1993).

Cited in *Sunamerica Fin. Corp. v. Bonham*, 328 N.C. 254, 400 S.E.2d 435 (1991); *Estridge v. Ford Motor Co.*, 101 N.C. App. 716, 401 S.E.2d 85 (1991); *Metric Constructors, Inc. v. Industrial Risk Insurers*, 102 N.C. App. 59, 401 S.E.2d 126 (1991); *Fox v. Killian*, 102 N.C. App. 819, 403 S.E.2d 546 (1991); *Marler v. AMOCO OIL CO.*, 793 F. Supp. 656 (E.D.N.C. 1992); *Heart of Valley Motel, Inc. v. Edwards*, 111 N.C. App. 896, 433 S.E.2d 466 (1993); *Griffin*

v. Holmes, 843 F. Supp. 81 (E.D.N.C. 1993).

II. PLEADINGS, GENERALLY.

Damages Governed by Evidence Presented. — There is a longstanding rule that damages in this state are governed by the evidence presented rather than the claim made for relief; the fact that the complaint contained a much lower figure than the amount awarded did not mean that the trial judge abused his discretion. *Lovell v. Nationwide Mut. Ins. Co.*, 108 N.C. App. 416, 424 S.E.2d 181, aff'd in part; discretionary review improvidently granted in part, 334 N.C. 682, 435 S.E.2d 71 (1993).

Applicability of Subdivision (a)(2).

— Subdivision (a)(2) does not apply to diversity cases in U.S. District Court, and therefore could not provide a basis for dismissal of diversity personal injury action. *Creech v. Denning*, 148 F.R.D. 545 (E.D.N.C. 1993).

Dismissal May Not Be Imposed Mechanically. — Although dismissal under subsection (a)(2) of this rule is within the discretion of the trial court, when the rule is violated such sanction may not be imposed mechanically. Because the drastic sanction of dismissal is not always the best sanction available to the trial court and is certainly not the only sanction available, dismissal is to be applied only when the trial court determines that less drastic sanctions will

not suffice. *Foy v. Hunter*, 106 N.C. App. 614, 418 S.E.2d 299 (1992).

III. AFFIRMATIVE DEFENSES.

Failure to Plead Barred Issue on Appeal. — Defendants' failure to plead plaintiffs' contributory negligence case was a bar to this issue being raised on appeal. *Forbes v. Par Ten Group, Inc.*, 99 N.C. App. 587, 394 S.E.2d 643 (1990), discretionary review denied, 99 N.C. 587, 402 S.E.2d 824 (1991).

Failure to Plead Res Judicata. — The failure of the defendant to plead res judicata is not a bar to that issue being raised at hearing on summary judgment. *County of Rutherford ex rel. Child Support Enforcement Agency ex rel. Hedrick v. Whitener*, 100 N.C. App. 70, 394 S.E.2d 263 (1990).

Where a defendant does not raise an affirmative defense, etc. —

A defendant may not take advantage of the provisions of the statute of frauds by a motion to dismiss for failure to state a claim upon which relief could be granted, which must be pleaded as an affirmative defense. *Green v. Harbour*, 113 N.C. App. 280, 437 S.E.2d 719 (1993).

Complaint Sufficient to Put Defendants on Notice of a Contract. — Complaint alleging, that there was an express contract between plaintiff and defendants for payment of funeral expenses was sufficient to put defendants on notice of a contract; therefore, where defendants did not specifically plead the affirmative defense of the statute of frauds as required by § 1A-1, Rule 8(c), it would not be available as a defense to the contract. *Parrish Funeral Home v. Pittman*, 104 N.C. App. 268, 409 S.E.2d 327 (1991).

Failure to Cite Statutory Statute of Limitations Provision. — Failure to plead § 1-52(16) by precise number and subdivision is not fatal under subsection (c) of this Rule. *Bonestell v. North Topsail Shores Condominiums, Inc.*, 103 N.C. App. 219, 405 S.E.2d 222 (1991).

Effect of an Entry of Default. — The effect of an entry of default is that the defendant against whom entry of default is made is deemed to have admitted the allegations in plaintiff's complaint and is prohibited from defending on the merits of the case. *Spartan Leasing, Inc. v. Pollard*, 101 N.C. App. 450, 400 S.E.2d 476 (1991).

Rule 9. Pleading special matters.

CASE NOTES

I. In General.

III. Fraud, Duress, Mistake, etc.

I. IN GENERAL.

Applied in *Moore v. Wykle*, 107 N.C. App. 120, 419 S.E.2d 164 (1992), cert. denied, 332 N.C. 666, 424 S.E.2d 405 (1992); *Sharp v. Teague*, 113 N.C. App. 589, 439 S.E.2d 792 (1994).

Cited in *George Shinn Sports, Inc. v. Bahakel Sports, Inc.*, 99 N.C. App. 481, 393 S.E.2d 580 (1990); *Fox v. Killian*, 102 N.C. App. 819, 403 S.E.2d 546 (1991); *Bonestell v. North Topsail Shores Condominiums, Inc.*, 103 N.C. App. 219, 405 S.E.2d 222 (1991).

III. FRAUD, DURESS, MISTAKE, ETC.

Insufficient Allegation of Fraud Subjects Plaintiff to Summary Judgment. — Plaintiff cannot simply allege fraud and thereby escape summary judgment; therefore, where plaintiff asserted defendant never intended to honor its obligations, dismissal of the issue was appropriate. *Strum v. Exxon Co.*, 15 F.3d 327 (4th Cir. 1994).

Rule 10. Form of pleadings.

CASE NOTES

Cited in *Pugh v. Pugh*, 111 N.C. App. 118, 431 S.E.2d 873 (1993).

Rule 11. Signing and verification of pleadings.

Legal Periodicals. —
For Survey of Developments in North

Carolina Law (1992), see 71 N.C.L. Rev. 1893 (1993).

CASE NOTES

I. In General.

I. IN GENERAL.

Lack of Verification. — Petition for a contested case hearing, containing signatures of petitioner and his attorney, but which failed to include either an affidavit executed by petitioner or an affidavit executed by his attorney, was timely filed but was not verified under sections (b) and (c) of this rule when it was filed. *Gaskill v. State ex rel. Cobey*, 109 N.C. App. 656, 428 S.E.2d 474 (1993), pet. disc. rev. denied, 334 N.C. 163, 432 S.E.2d 359 (1993).

Sanction Provision Not Applicable to Claims Filed Before Amendment of This Rule. —

Although plaintiffs and their attorney could be liable for sanctions under this Rule for signing and filing certain "other papers" for an improper purpose after January 1, 1987, the complaint in the case at bar was filed in December of 1986, and therefore could not be a basis for the imposition of sanctions. *Brooks v. Giesey*, 334 N.C. 303, 432 S.E.2d 339 (1993).

Dismissal does not deprive the court of jurisdiction to consider collateral issues such as sanctions that require consideration after the action has been terminated. *Bryson v. Sullivan*, 330 N.C. 644, 412 S.E.2d 327 (1992).

Neither the dismissal of a case nor the filing of an appeal deprives the trial court of jurisdiction to hear Rule 11 motions. *Dodd v. Steele*, 114 N.C. App. 632, 442 S.E.2d 363 (1994).

When Sanctions May Be Imposed.

— To impose sanctions against a party for filing a complaint for an improper purpose, the complaint must fail either the legal or factual certification require-

ments of this rule. In *re Finnican*, 104 N.C. App. 157, 408 S.E.2d 742 (1991), cert. denied, 330 N.C. 612, 413 S.E.2d 800 (1992).

Sanctions Where Party Knew Pleadings Not Factually Plausible.

— Where judge announced the rendering of an absolute divorce in open court while defendant was present with counsel, when defendant's motion to dismiss based on lack of service was later filed defendant knew that the pleading was not factually plausible because he had made a general appearance; therefore, the trial court's imposition of sanctions under this rule was proper. *Bumgardner v. Bumgardner*, 113 N.C. App. 314, 438 S.E.2d 471 (1994).

The Improper Purpose Prong. —

The improper purpose prong of this Rule is separate and distinct from the factual and legal sufficiency requirements. Certification under the rule includes three things: That the subject person has read the document, that he or she believes it to be well-grounded in fact and law, and that it is not interposed for any improper purpose. *Bryson v. Sullivan*, 330 N.C. 644, 412 S.E.2d 327 (1992).

A claim, while well grounded in law, can nevertheless violate the improper purpose prong of this Rule. *Taylor v. Taylor Prods. Inc.*, 105 N.C. App. 620, 414 S.E.2d 568 (1992), overruled on other grounds, 334 N.C. 303, 432 S.E.2d 347 (1993).

While attorney's filing of the notice of lien against former client after having withdrawn from the case violated the legal sufficiency prong of this rule, that itself did not support a strong inference of improper purpose. However, the totality of the circumstances did. *Mack v.*

Moore, 107 N.C. App. 87, 418 S.E.2d 685 (1992).

Trial court's decision to impose or not to impose, etc. —

In accord with the main volume. See *Williams v. Garrison*, 105 N.C. App. 79, 411 S.E.2d 633 (1992).

Inference of Improper Purpose Inferred from Objective Behavior. —

Under this rule, an objective standard is used to determine whether a paper has been interposed for an improper purpose, with the burden on the movant to prove such improper purpose. In this regard, the relevant inquiry is whether the existence of an improper purpose may be inferred from the alleged offender's objective behavior. *Mack v. Moore*, 107 N.C. App. 87, 418 S.E.2d 685 (1992).

Reasonableness of Belief That Claim Is Warranted. —

The reasonableness of the belief that a complaint is warranted by existing law must be judged as of the time the document was signed. *Taylor v. Taylor Prods. Inc.*, 105 N.C. App. 620, 414 S.E.2d 568 (1992), overruled on other grounds, 334 N.C. 303, 432 S.E.2d 347 (1993).

Motion for Attorney's Fees. — Petitioner's motion for attorney's fees, filed well before final judgment, was timely; therefore, the trial court had jurisdiction to hear the matter. *Whiteco Indus., Inc. v. Harrelson*, 111 N.C. App. 815, 434 S.E.2d 229 (1993); *Whiteco Indus., Inc. v. Harrington*, 111 N.C. App. 839, 434 S.E.2d 234 (1993), cert. granted, 335 N.C. 565, 441 S.E.2d 135 (1994).

Sanctions Not Merited. — Where there was no indication at trial that the grandparents in fact did not wish to obtain custody of the children or that their claim was made in bad faith, the fact that the grandparents had originally asked for visitation does not make their later claim for custody violative of this rule. *Kerns v. Southern*, 100 N.C. App. 664, 397 S.E.2d 651 (1990).

Although claimant was explicitly told by an employee of the Employment Security Commission that she was not required to conduct a job search during her temporary recall, because there were grounds for the Commission's holding, under § 96-18(g)(2), that claimant repay the sum, received as benefits, based on failure to conduct a job search, sanctions could not be imposed. *Gilliam v. Employment Sec. Comm'n*, 110 N.C. App. 796, 431 S.E.2d 772, cert. denied and ap-

peal dismissed, 334 N.C. 619, 435 S.E.2d 334 (1993).

Attorney made a "reasonable inquiry" into the factual bases for the allegations contained in the complaint regarding conspiracy, an auto theft-drug ring, and intentional infliction of emotional distress; therefore, the sanctions imposed against attorney were not warranted. *Pugh v. Pugh*, 111 N.C. App. 118, 431 S.E.2d 873, aff'd, 113 N.C. App. 375, 438 S.E.2d 214 (1994).

Imposition of Sanctions Upheld. —

Striking of the notice of the taking of a deposition and prohibiting its further use was a reasonable sanction for a deposition procured in violation of deposition rules, even though it was defendant's counsel, and not defendant itself, who committed the acts giving rise to the sanction. *Turner v. Duke Univ.*, 101 N.C. App. 276, 399 S.E.2d 402, cert. denied, 329 N.C. 504, 407 S.E.2d 552 (1991).

Insured and insured's attorney were properly assessed costs and expenses incurred by holder of security interest in insured's vehicle for improperly naming holder as a party in an action against vehicle's insurer, despite plaintiff's contention that holder was named in pleadings to give it notice as a lienholder. *Lassiter v. North Carolina Farm Bureau Mut. Ins. Co.*, 106 N.C. App. 66, 415 S.E.2d 212, cert. denied, 332 N.C. 148, 419 S.E.2d 573 (1992).

A superior court award of \$2,918.82 to reimburse plaintiff for attorneys' fees and expenses and an order to defendant to pay \$1,000 to the clerk of superior court as an additional sanction for filing frivolous and vexatious motions to dismiss and for summary judgment was not an abuse of discretion where defendant persisted in advancing arguments which had been previously rejected by the courts. *Lowder v. All Star Mills, Inc.*, 103 N.C. App. 500, 405 S.E.2d 774, cert. denied, 330 N.C. 196, 412 S.E.2d 678 (1991), 332 N.C. 484, 421 S.E.2d 349 (1992).

Where a motion to dismiss and a motion for summary judgment were based on the same grounds that had proven baseless in past motions and appeals, and were patently frivolous, the trial judge had more than ample basis for imposition of sanctions. *Lowder v. All Star Mills, Inc.*, 103 N.C. App. 500, 405 S.E.2d 774, cert. denied, 330 N.C. 196, 412 S.E.2d 678 (1991), 332 N.C. 484, 421 S.E.2d 349 (1992).

Co-counsel for corporate defendant, almost 19 months after corporation employees' counsel gave notice that she was serving as co-counsel, and only two weeks before trial, signed and filed a motion for disqualification of counsel; neither his co-counsel nor his client signed it, and there was no evidence that co-counsel even knew that the motion was being filed, the late date on which the motion was filed indicated an attempt to interrupt opposing counsel's trial preparation and increase litigation costs. Therefore, Rule 11 sanctions were appropriate. *Harrison v. Edison Bros. Apparel Stores*, 146 F.R.D. 142 (M.D.N.C. 1993).

There was no abuse of discretion in the court's imposition of \$931 in sanctions; the court found as a fact that defendant incurred \$931.00 as a necessary consequence of plaintiff's notice of appeal following a voluntary dismissal and that the rate was reasonable. *Dodd v. Steele*, 114 N.C. App. 632, 442 S.E.2d 363 (1994).

Where the Employment Commission's signing of order remanding the matter to a hearing officer just three days prior to the date by which the Commission was to have entered a final order could be calculated as an attempt to delay the litigation or increase its cost, sanctions would apply. *Gilliam v. Employment Sec. Comm'n*, 110 N.C. App. 796, 431 S.E.2d 772, cert. denied and appeal dismissed, 334 N.C. 619, 435 S.E.2d 334 (1993).

Where ex-husband filed a complaint to harass ex-wife and needlessly increase the costs of litigation, where senseless litigation initiated by ex-husband had persisted since the parties' separation in 1986, while ex-husband claimed the litigation was part and parcel of his attempts to increase visitation privileges with his son, but he had done nothing constructive to further that objective, and testimony indicated that he has spent \$20,000 trying to recover \$10,000 in attorney's fees, the trial did not err in imposing \$15,000 sanction against the ex-husband. *Brown v. Brown*, 112 N.C. App. 614, 436 S.E.2d 404 (1993).

Trial court concluded that plaintiff's third-party complaint was filed for improper purposes, to harass and cause unnecessary delay and costs, where it was filed approximately two weeks prior to trial. *Benton v. Thomerson*, 113 N.C. App. 293, 438 S.E.2d 434 (1994).

Harassment of Former Client. — In

light of the obviously strained relationship between former attorney and client, and because it is utterly unreasonable for an attorney, particularly one who has withdrawn from the case, to file an attorney's charging lien seeking recovery of fees based on both quantum meruit and a percentage of the judgment, there exists a strong inference of improper purpose, i.e., harassment, in filing the notice of lien. Accordingly, the trial court's imposition of Rule 11 sanctions based on alleged improper purpose in filing the notice of lien must be upheld. *Mack v. Moore*, 107 N.C. App. 87, 418 S.E.2d 685 (1992).

Subjective Beliefs and Actual Effect of Conduct Not Relevant. — Just as the Rule 11 movant's subjective belief that a paper had been filed for an improper purpose was immaterial in determining whether an alleged offender's conduct was sanctionable, whether the conduct did in fact harass was also not relevant to the issue. Rather, the dispositive question was whether the filing of the notice of lien supported a strong inference of improper purpose. *Mack v. Moore*, 107 N.C. App. 87, 418 S.E.2d 685 (1992).

Denial of Sanctions Not Insulation from Future Sanctions. — The denial of sanctions does not insulate a party or an attorney from the future imposition of sanctions under the improper purpose prong of this rule if the litigation is continued after subsequent developments in the case render it meritless. *Taylor v. Taylor Prods. Inc.*, 105 N.C. App. 620, 414 S.E.2d 568 (1992), overruled on other grounds, 334 N.C. 303, 432 S.E.2d 347 (1993).

Features of Certification. — The central feature of this rule is a certification established by the signature of the person signing the pleadings, motions, or other papers. This certification includes: (1) that the signer has conducted a reasonable inquiry into the facts that support the pleading, motion or other paper; (2) that the signer has conducted a reasonable inquiry into the law such that the paper embodies existing legal principles or a good faith argument for the extension, modification, or reversal of existing legal principles; and (3) that the paper is not interposed for any improper purpose. *Bryson v. Sullivan*, 102 N.C. App. 1, 401 S.E.2d 645 (1991), modified on other grounds, 330 N.C. 644, 412 S.E.2d 327 (1992).

Under this rule, in addition to certify-

ing that the pleading or paper is well grounded in fact and not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation, the signer also certifies that the pleading or paper is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law. *Mack v. Moore*, 107 N.C. App. 87, 418 S.E.2d 685 (1992).

Two-Part Analysis. — An award of sanctions under this rule on the ground that a pleading is not warranted by existing law requires a two-part analysis. First, the court must determine whether the pleading, when read in conjunction with the responsive pleadings, is facially plausible. If it is facially plausible, then the inquiry is complete, and sanctions are not proper. If the pleading is not facially plausible, then the second issue is whether to the best of the signer's knowledge, information, and belief formed after reasonable inquiry, the complaint was warranted by the existing law. *dePasquale v. O'Rahilly*, 102 N.C. App. 240, 401 S.E.2d 827 (1991).

In determining whether sanctions are warranted under the legal sufficiency prong of the rule, the court must first determine the facial plausibility of the paper. If the paper is facially plausible, then the inquiry is complete, and sanctions are not proper. If the paper is not facially plausible, then the second issue is (1) whether the alleged offender undertook a reasonable inquiry into the law, and (2) whether, based upon the results of the inquiry, formed a reasonable belief that the paper was warranted by existing law, judged as of the time the paper was signed. If the court answers either prong of this second issue negatively, then sanctions under this rule are appropriate. *Mack v. Moore*, 107 N.C. App. 87, 418 S.E.2d 685 (1992).

Three-Part Analysis. — There are three parts to a Rule 11 analysis: (1) factual sufficiency, (2) legal sufficiency, and (3) improper purpose; a violation of any one of these requirements mandates the imposition of sanctions. *Dodd v. Steele*, 114 N.C. App. 632, 442 S.E.2d 363 (1994).

Collateral Issues. — Attorneys' fee requests under this rule raise collateral issues which often require consideration by the trial court after the action has been terminated, and a voluntary dismissal under § 1A-1, Rule 41(a) does not deprive the trial court of jurisdiction to

determine these collateral issues. *Higgins v. Patton*, 102 N.C. App. 301, 401 S.E.2d 854 (1991), overruled on other grounds, *Bryson v. Sullivan*, 330 N.C. 644, 412 S.E.2d 327 (1992).

Voluntary Dismissal. — Where the plaintiffs filed a voluntary dismissal with prejudice pursuant to § 1A-1, Rule 41(a)(1), the trial court was not deprived of jurisdiction to determine the appropriateness of attorneys' fees under this rule or § 6-21.5. *Bryson v. Sullivan*, 102 N.C. App. 1, 401 S.E.2d 645 (1991), modified on other grounds, 330 N.C. 644, 412 S.E.2d 327 (1992).

Considerations for Court. — This rule raises three interconnected interpretive issues for the court: (1) When has sanctionable conduct occurred? (2) Who should be sanctioned, attorney, client, or both? (3) What sanction is appropriate? *Bryson v. Sullivan*, 102 N.C. App. 1, 401 S.E.2d 645 (1991), modified on other grounds, 330 N.C. 644, 412 S.E.2d 327 (1992).

Inadequate Researching and Filing of Pleadings by Attorney. — Prior to imposing sanctions against an attorney under this rule on the ground that the nonmovant's pleadings are not warranted by the existing law, the movant must show that the attorney's conduct in researching and filing the pleadings was not objectively reasonable. *dePasquale v. O'Rahilly*, 102 N.C. App. 240, 401 S.E.2d 827 (1991).

Failure of Attorney to Confirm Facts. — The attorney should be sanctioned for failure to take minimal steps to confirm the client's facts, when these facts could be verified easily by reference to the public record or to accessible documents. *Bryson v. Sullivan*, 102 N.C. App. 1, 401 S.E.2d 645 (1991).

Sanctions Against Attorney and Client. — Generally, since the lawyer exercises primary control over the litigation, the responsibility for improper purpose violations should rest with the lawyer. However, "the sanction may fall in equal or greater proportion upon the client as well" as this allocation serves punitive and deterrent purposes. *Bryson v. Sullivan*, 102 N.C. App. 1, 401 S.E.2d 645 (1991), modified on other grounds, 330 N.C. 644, 412 S.E.2d 327 (1992).

Sanctions Against Client. — Whether the violation of this rule is one of law, fact, or improper purpose, if the prejudice caused by the violation can only be remedied by entry of sanctions against the client, such sanctions are ap-

propriate. *Bryson v. Sullivan*, 102 N.C. App. 1, 401 S.E.2d 645 (1991), modified on other grounds, 330 N.C. 644, 412 S.E.2d 327 (1992).

Where a party misleads an attorney as to facts or the purpose of the lawsuit, but the attorney nevertheless had an objectively reasonable basis to sign the papers in question, then sanctions on the party alone are appropriate. *Bryson v. Sullivan*, 102 N.C. App. 1, 401 S.E.2d 645 (1991), modified on other grounds, 330 N.C. 644, 412 S.E.2d 327 (1992).

No Sanctions Against Client. — Clients should not be sanctioned when the attorney fails to ask the right questions to elicit legally relevant facts. *Bryson v. Sullivan*, 102 N.C. App. 1, 401 S.E.2d 645 (1991), modified on other grounds, 330 N.C. 644, 412 S.E.2d 327 (1992).

Allocation of Sanctions. — Sanctions should be allocated among the persons responsible for the offending pleading, motion or other paper, based upon their relative culpability. *Bryson v. Sullivan*, 102 N.C. App. 1, 401 S.E.2d 645 (1991), modified on other grounds, 330 N.C. 644, 412 S.E.2d 327 (1992).

De Novo Review of Sanctions. — Court of Appeals exercises de novo review of the question of whether to impose Rule 11 sanctions; if sanctions were warranted, the court must review the actual sanctions imposed under an abuse of discretion standard. *Dodd v. Steele*, 114 N.C. App. 632, 442 S.E.2d 363 (1994).

Reliance on Counsel by Nonlawyers as to Issues of Law. — Reliance on counsel by nonlawyers as to issues of law, is relevant, but not conclusive evidence on the issue of "reasonable inquiry." The reasonableness of the reliance would depend upon the surrounding circumstances including the extent of knowledge possessed by the lawyer about the facts of the controversy, the history and duration of the relationship between the attorney and client, and the relative expertise of the attorney relating to the legal issues involved. It is appropriate, however, to consider in evaluating the reasonableness of the inquiry that nonlawyers are not expected to appreciate the nuances of subtle legal issues. *Bryson v. Sullivan*, 102 N.C. App. 1, 401 S.E.2d 645 (1991), modified on other grounds, 330 N.C. 644, 412 S.E.2d 327 (1992).

Determining Compliance with Rule. — In determining compliance with this rule, courts should avoid hind-

sight and resolve all doubts in favor of the signer. Furthermore, whether the certification requirements have been met requires an objective determination. *Bryson v. Sullivan*, 102 N.C. App. 1, 401 S.E.2d 645 (1991), modified on other grounds, 330 N.C. 644, 412 S.E.2d 327 (1992).

Signature of Party Unnecessary for Sanctions. — Defendants were entitled to request sanctions against the attorney, as signer of complaint, and against plaintiffs as represented parties, regardless of whether the plaintiffs signed the complaint. *Higgins v. Patton*, 102 N.C. App. 301, 401 S.E.2d 854 (1991), overruled on other grounds, *Bryson v. Sullivan*, 330 N.C. 644, 412 S.E.2d 327 (1992).

Burdens of Proof and Persuasion. — When a motion is made for sanctions pursuant to this rule and the nature of the alleged violation is legal, rather than factual, this rule requires a two-part analysis. In such cases, the court should first scrutinize the challenged paper. If, on its face, the paper states a plausible legal theory (either under existing law or a good faith argument for a change in the law), there is no need for further inquiry. Only if the court concludes that the paper is not facially plausible in its legal analysis is there a need for further scrutiny into the actual conduct of the signer in researching or otherwise gathering the law. The movant bears the burden of persuasion on the first prong of the two-part analysis and the burdens of proof and persuasion on the second prong. *Bryson v. Sullivan*, 102 N.C. App. 1, 401 S.E.2d 645 (1991), modified on other grounds, *In re J.A.*, 103 N.C. App. 720, 407 S.E.2d 873 (1991).

Plaintiff's affidavits did not support the court's finding that judgment was entered as a result of mistake, inadvertence or excusable neglect, as the inadvertence, mistake, or neglect that they showed were of a kind that the law does not excuse. All the affidavits showed, when sifted down, was that in signing the court papers which enabled default judgment to be entered plaintiff's treasurer and counsel were unaware that they had sued for future rents — a matter that they could have known through the exercise of due diligence and reasonable care, and that they were required to know by § 1A-1, Rule 11 of our civil procedure rules. *Kimzey Winston-Salem, Inc. v. Jester*,

103 N.C. App. 77, 404 S.E.2d 176, cert. denied, 329 N.C. 497, 407 S.E.2d 534 (1991).

Applied in *Lowry v. Lowry*, 99 N.C. App. 246, 393 S.E.2d 141 (1990); *First Am. Bank v. Carley Capital Group*, 99 N.C. App. 667, 394 S.E.2d 237 (1990); *Oglesby v. S.E. Nichols, Inc.*, 101 N.C. App. 676, 401 S.E.2d 92 (1991); *Boone Lumber, Inc. v. Sigmon*, 103 N.C. App. 798, 407 S.E.2d 291 (1991); *Harwell v. Harwell*, 106 N.C. App. 389, 416 S.E.2d 595 (1992); *Brooks v. Giesey*, 106 N.C. App. 586, 418 S.E.2d 236 (1992); *Jerry Bayne, Inc. v. Skyland Indus., Inc.*, 108 N.C. App. 209, 423 S.E.2d 521 (1992); *Able Outdoor, Inc. v. Harrelson*, 113 N.C. App. 483, 439 S.E.2d 245 (1994).

Quoted in *In re Triscari Children*, 109 N.C. App. 285, 426 S.E.2d 435 (1993).

Stated in *Parsons v. Jefferson-Pilot Corp.*, 106 N.C. App. 307, 416 S.E.2d 914 (1992); *Williams v. Liggett*, 113 N.C. App. 812, 440 S.E.2d 331 (1994).

Cited in *McKinney v. Avery Journal, Inc.*, 99 N.C. App. 529, 393 S.E.2d 295 (1990); *Alford v. Shaw*, 327 N.C. 526, 398 S.E.2d 445 (1990); *Battle v. Nash Technical College*, 103 N.C. App. 120, 404 S.E.2d 703 (1991); *T.H. Blake Contracting Co. v. Sorrells*, 109 N.C. App. 119, 426 S.E.2d 85 (1993); *Pearsall v. Phillips*, 839 F. Supp. 11 (E.D.N.C. 1993).

Rule 12. Defenses and objections; when and how presented; by pleading or motion; motion for judgment on pleading.

Legal Periodicals. —

For article, "Functions of Rule 12(b)(6) in the Federal Rules of Civil Procedure:

A Categorization Approach," see 15 Campbell L. Rev. 119 (1993).

CASE NOTES

- I. In General.
- III. Preservation and Waiver of Defenses, Generally.
- IV. Subject Matter Jurisdiction.
- V. Personal Jurisdiction.
- IX. Failure to State Claim.
 - A. In General.
 - B. Conversion of Motion to Dismiss to Summary Judgment Motion.
- XI. Motion for Judgment on the Pleadings.

I. IN GENERAL.

Taken together, subsection (b)(6) of this rule and § 1A-1, Rule 8(a) suggest pleadings should be limited to those facts or descriptions of transactions, occurrences, or series of transactions or occurrences, intended to be proved. *Bowlin v. Duke Univ.*, 108 N.C. App. 145, 423 S.E.2d 320 (1992), cert. denied, 333 N.C. 461, 427 S.E.2d 618 (1993).

An order entered out of session without the parties' consent is null and void and must be vacated pursuant to subsection (h)(3) of this rule. *Turner v. Hatchett*, 104 N.C. App. 487, 409 S.E.2d 747 (1991).

Distinction Between Motion to Dismiss and Motion for Summary Judgment. — The distinction between a mo-

tion to dismiss under subdivision (b)(6) of this rule and a motion for summary judgment is more than a mere technicality. When considering a motion to dismiss, the trial court need only look to the face of the complaint to determine whether it reveals an insurmountable bar to plaintiff's recovery. By contrast, when considering a summary judgment motion, the trial court must look at more than the pleadings; it must also consider additional matters such as affidavits, depositions and other specified matter outside the pleadings. *Locus v. Fayetteville State Univ.*, 102 N.C. App. 522, 402 S.E.2d 862 (1991).

Justiciable Controversy. — The mere filing of an affirmative defense, without more, is not sufficient to establish the absence of a justiciable issue, nor is the grant of a motion under subdi-

vision (b)(6) of this rule, nor the entry of summary judgment. These events may only be evidence of the absence of a justiciable issue. However, action by the losing party which perpetuated litigation in the face of events substantially establishing that the pleadings no longer presented a justiciable controversy may also serve as evidence for purposes of § 6-21.5. *Sunamerica Fin. Corp. v. Bonham*, 328 N.C. 254, 400 S.E.2d 435 (1991).

Procedure and Discovery in Shareholders' Derivative Actions. —

For a case discussing interplay of rules and statutes governing procedure and discovery in shareholders' derivative action, particularly with respect to former § 55-55(c) (see now § 55-7-40(d)), this rule, and § 1A-1, Rules 23 and 56, see *Alford v. Shaw*, 327 N.C. 526, 398 S.E.2d 445 (1990).

Applied in *George Shinn Sports, Inc. v. Bahakel Sports, Inc.*, 99 N.C. App. 481, 393 S.E.2d 580 (1990); *Hare v. Butler*, 99 N.C. App. 693, 394 S.E.2d 231 (1990); *Pinehurst Area Realty, Inc. v. Village of Pinehurst*, 100 N.C. App. 77, 394 S.E.2d 251 (1990); *Lexington Aerolina, Inc. v. Murray Aviation, Inc.*, 100 N.C. App. 254, 394 S.E.2d 838 (1990); *Harris-Teeter Super Mkts, Inc. v. Watts*, 98 N.C. App. 684, 392 S.E.2d 123 (1990); *Cherokee Home Demonstration Club v. Oxendine*, 100 N.C. App. 622, 397 S.E.2d 643 (1990); *Rabon v. Rabon*, 102 N.C. App. 452, 402 S.E.2d 461 (1991); *Warzynski v. Empire Comfort Sys.*, 102 N.C. App. 222, 401 S.E.2d 801 (1991); *Estridge v. Ford Motor Co.*, 101 N.C. App. 716, 401 S.E.2d 85 (1991); *Lynn v. Overlook Dev.*, 328 N.C. 689, 403 S.E.2d 469 (1991); *Amos v. Oakdale Knitting Co.*, 102 N.C. App. 782, 403 S.E.2d 565 (1991); *Coleman v. Cooper*, 102 N.C. App. 650, 403 S.E.2d 577 (1991); *Caldwell v. Caldwell*, 103 N.C. App. 380, 405 S.E.2d 588 (1991); *Doe ex rel. Connolly v. Holt*, 103 N.C. App. 516, 405 S.E.2d 807 (1991); *Hull v. Oldham*, 104 N.C. App. 29, 407 S.E.2d 611 (1991); *Coastal Leasing Corp. v. O'Neal*, 103 N.C. App. 230, 405 S.E.2d 208 (1991); *Powers v. Parish*, 104 N.C. App. 400, 409 S.E.2d 725 (1991); *Williams v. New Hanover County Bd. of Educ.*, 104 N.C. App. 425, 409 S.E.2d 753 (1991); *Moore v. Wykle*, 107 N.C. App. 120, 419 S.E.2d 164; *Venable v. GKN Automotive*, 107 N.C. App. 579, 421 S.E.2d 378 (1992); *Sorrells v. M.Y.B. Hospitality Ventures*, 332 N.C. 645, 423 S.E.2d 72 (1992);

Monti ex rel. United States v. United Servs. Auto. Ass'n, 108 N.C. App. 342, 423 S.E.2d 530 (1992); *White v. Williams*, 111 N.C. App. 879, 433 S.E.2d 808 (1993); *Reid v. Roberts*, 112 N.C. App. 222, 435 S.E.2d 116 (1993); *Poston v. Poston*, 112 N.C. App. 849, 436 S.E.2d 854 (1993); *Brantley v. Watson*, 113 N.C. App. 234, 438 S.E.2d 211 (1994); *O'Donnell v. City of Asheville*, 113 N.C. App. 178, 438 S.E.2d 422 (1994); *Bumgardner v. Bumgardner*, 113 N.C. App. 314, 438 S.E.2d 471 (1994); *Jenkins v. Wilson*, 113 N.C. App. 557, 439 S.E.2d 244 (1994); *Floraday v. Don Galloway Homes, Inc.*, 114 N.C. App. 214, 441 S.E.2d 610 (1994).

Stated in *Haas v. Caldwell Sys.*, 98 N.C. App. 679, 392 S.E.2d 110 (1990); *Embree Constr. Group, Inc. v. Rafcor, Inc.*, 330 N.C. 487, 411 S.E.2d 916 (1992); *Adams Outdoor Adv. v. North Carolina DOT*, 112 N.C. App. 120, 434 S.E.2d 666 (1993).

Cited in *May v. Martin*, 99 N.C. App. 216, 392 S.E.2d 414 (1990); *Roan-Baker v. Southeastern Hosp. Supply Corp.*, 99 N.C. App. 30, 392 S.E.2d 663 (1990); *Snow v. Yates*, 99 N.C. App. 317, 392 S.E.2d 767 (1990); *Schall v. Jennings*, 99 N.C. App. 343, 393 S.E.2d 130 (1990); *Medley v. North Carolina Dep't of Cor.*, 99 N.C. App. 296, 393 S.E.2d 288 (1990); *Carolina-Atlantic Distribs., Inc. v. Boyce Insulation Co.*, 99 N.C. App. 577, 393 S.E.2d 337 (1990); *Surratt v. Newton*, 99 N.C. App. 396, 393 S.E.2d 554 (1990); *Stallings v. Gunter*, 99 N.C. App. 710, 394 S.E.2d 212 (1990); *First Am. Bank v. Carley Capital Group*, 99 N.C. App. 667, 394 S.E.2d 237 (1990); *Beatty v. Charlotte-Mecklenburg Bd. of Educ.*, 99 N.C. App. 753, 394 S.E.2d 242 (1990); *Hill v. Winn-Dixie Charlotte, Inc.*, 100 N.C. App. 518, 397 S.E.2d 347 (1990); *McCollum v. McCollum*, 102 N.C. App. 347, 401 S.E.2d 773 (1991); *Fox v. Killian*, 102 N.C. App. 819, 403 S.E.2d 546 (1991); *Hart v. Ivey*, 102 N.C. App. 583, 403 S.E.2d 914 (1991); *Greer v. Parsons*, 103 N.C. App. 463, 405 S.E.2d 921 (1991); *Woodson v. Rowland*, 329 N.C. 330, 407 S.E.2d 222 (1991); *North Carolina R.R. v. Ferguson Bldrs. Supply*, 103 N.C. App. 768, 407 S.E.2d 296 (1991); *Shingledecker v. Shingledecker*, 103 N.C. App. 783, 407 S.E.2d 589 (1991); *Ray v. Ray*, 103 N.C. App. 790, 407 S.E.2d 592 (1991); *Ferrell v. DOT*, 104 N.C. App. 42, 407 S.E.2d 601 (1991); *Brickhouse v. Brickhouse*, 104 N.C. App. 69, 407 S.E.2d 607 (1991); *Hall v. Sim-*

mons, 329 N.C. 779, 407 S.E.2d 816 (1991); Daniels v. Hertz Corp., 104 N.C. App. 700, 411 S.E.2d 394 (1991); Salt v. Applied Analytical, Inc., 104 N.C. App. 652, 412 S.E.2d 97 (1991); Ballance v. Rinehart, 105 N.C. App. 203, 412 S.E.2d 106 (1992); Taylor v. Taylor Prods. Inc., 105 N.C. App. 620, 414 S.E.2d 568 (1992); Perkins v. CCH Computax, Inc., 106 N.C. App. 210, 415 S.E.2d 755 (1992); Gardner v. Gardner, 106 N.C. App. 635, 418 S.E.2d 260 (1992); Lenzer v. Flaherty, 106 N.C. App. 496, 418 S.E.2d 276 (1992); Foy v. Hunter, 106 N.C. App. 614, 418 S.E.2d 299 (1992); Ryles v. Durham Co. Hosp. Corp., 107 N.C. App. 455, 420 S.E.2d 487 (1992); State ex rel. Thornburg v. Lot & Bldgs. at 800 Waughtown St., 107 N.C. App. 559, 421 S.E.2d 374 (1992); Tutterrow v. Leach, 107 N.C. App. 703, 421 S.E.2d 816 (1992); Nationwide Mut. Ins. Co. v. Silverman ex rel. Radja, 332 N.C. 633, 423 S.E.2d 68 (1992); Perkins v. CCH Computax, Inc., 333 N.C. 140, 423 S.E.2d 780 (1992); Pendergrass v. Card Care, Inc., 333 N.C. 233, 424 S.E.2d 391 (1993); Sorrells v. M.Y.B. Hospitality Ventures, 108 N.C. App. 668, 424 S.E.2d 676 (1993); Pieper v. Pieper, 108 N.C. App. 722, 425 S.E.2d 435 (1993); Winter v. Williams, 108 N.C. App. 739, 425 S.E.2d 458 (1993); Lindler v. Duplin County Bd. of Educ., 108 N.C. App. 757, 425 S.E.2d 465 (1993); Richmond County v. North Carolina Low-level Radioactive Waste Mgt. Auth., 108 N.C. App. 700, 425 S.E.2d 468 (1993); Munie v. Tangle Oaks Corp., 109 N.C. App. 336, 427 S.E.2d 149 (1993); Capital Outdoor Adv., Inc. v. City of Raleigh, 109 N.C. App. 399, 427 S.E.2d 154 (1993); Little v. Bennington, 109 N.C. App. 482, 427 S.E.2d 887; Bockweg v. Anderson, 333 N.C. 486, 428 S.E.2d 157 (1993); Hickman ex rel. Womble v. McKoin, 109 N.C. App. 478, 428 S.E.2d 251 (1993); Gravitte v. Mitsubishi Semiconductor Am., Inc., 109 N.C. App. 466, 428 S.E.2d 254; Andrews v. Elliot, 109 N.C. App. 271, 426 S.E.2d 430 (1993); Gaskill v. State ex rel. Cobey, 109 N.C. App. 656, 428 S.E.2d 474 (1993); Woodard v. North Carolina Local Governmental Employees' Retirement Sys., 110 N.C. App. 83, 428 S.E.2d 849 (1993); Cherry v. Harris, 110 N.C. App. 478, 429 S.E.2d 771 (1993); Powell v. Omli, 110 N.C. App. 336, 429 S.E.2d 774 (1993); Kuder v. Schroeder, 110 N.C. App. 355, 430 S.E.2d 271 (1993); Prevette v. Forsyth County, 110 N.C. App. 754, 431 S.E.2d

216 (1993); Hargett v. Holland, 111 N.C. App. 200, 431 S.E.2d 784 (1993); Considine v. West Point Dairy Prods., 111 N.C. App. 427, 432 S.E.2d 412 (1993); House of Raeford Farms, Inc. v. State ex rel. Envtl. Mgt. Comm'n, 112 N.C. App. 228, 435 S.E.2d 106 (1993); Bardolph v. Arnold, 112 N.C. App. 190, 435 S.E.2d 109 (1993); Sorrells v. M.Y.B. Hospitality Ventures, 334 N.C. 669, 435 S.E.2d 320 (1993); Keys v. Duke Univ., 112 N.C. App. 518, 435 S.E.2d 820 (1993); Richmond County v. North Carolina Low-Level Radioactive Waste Mgt. Auth., 335 N.C. 77, 436 S.E.2d 113 (1993); Abels v. Renfro Corp., 335 N.C. 209, 436 S.E.2d 822 (1993); Charlotte-Mecklenburg Hosp. Auth. v. First of Ga. Ins. Co., 112 N.C. App. 828, 436 S.E.2d 869 (1993); Cohn v. Wilkes Regional Medical Ctr., 113 N.C. App. 275, 437 S.E.2d 889 (1994); Conklin v. Carolina Narrow Fabrics Co., 113 N.C. App. 542, 439 S.E.2d 239 (1994); Smith v. Smith, 113 N.C. App. 410, 438 S.E.2d 457 (1994); Naegele Outdoor Adv., Inc. v. City of Winston-Salem, 113 N.C. App. 758, 440 S.E.2d 842 (1994); Donovan v. Fiumara, 114 N.C. App. 524, 442 S.E.2d 572 (1994); City of Raleigh v. Hudson Belk Co., 114 N.C. App. 815, 443 S.E.2d 112 (1994).

III. PRESERVATION AND WAIVER OF DEFENSES, GENERALLY.

Waiver of Venue in Custody and Support Modification Proceeding. — Waiver of venue occurs when a custody and support modification request is filed with the district court in an improper county and there is no timely demand that the trial be conducted in the proper county. In such event, the district court in the improper county appropriately adjudicates the modification request. Brooks v. Brooks, 107 N.C. App. 44, 418 S.E.2d 534 (1992).

IV. SUBJECT MATTER JURISDICTION.

And a motion to dismiss for lack of subject matter jurisdiction is not viewed in the same manner, etc. —

Failure to properly file a petition for writ of certiorari with the superior court which would have allowed the court to exercise its jurisdiction following administrative hearing justified dismissal by the trial court. House of Raeford Farms, Inc. v. City of Raeford, 104 N.C. App. 280, 408 S.E.2d 885 (1991).

Failure to Comply with Requirements of § 1A-1, Rule 23(b) Not Jurisdictional Defect. — Although complaint, in shareholders' derivative suit was not properly verified, because § 1A-1, Rule 23(b) addresses the procedure to be followed in, and not the substantive elements of, a shareholders' derivative suit, plaintiffs' failure to comply with the verification requirement at the time the complaint was filed was not a jurisdictional defect. *Alford v. Shaw*, 327 N.C. 526, 398 S.E.2d 445 (1990).

V. PERSONAL JURISDICTION.

Motion to Dismiss for Lack of Personal Jurisdiction. — Motion to dismiss should have been granted to defendant, where court lacked authority to exercise personal jurisdiction over it. *Transtector Sys. v. Electric Supply, Inc.*, 113 N.C. App. 148, 437 S.E.2d 699 (1993).

IX. FAILURE TO STATE CLAIM.

A. In General.

Constitutional Issues. — To test the legal sufficiency of a complaint asserting constitutional issues, a party may move to dismiss under this rule. *North Carolina E. Mun. Power v. Wake County*, 100 N.C. App. 693, 398 S.E.2d 486 (1990), cert. denied, 329 N.C. 270, 407 S.E.2d 838 (1991).

In a conversion action, owners of leased portable hangers stated claim based on city's taking control of hangers pursuant to a bankruptcy clause in the agreement, even though plaintiff owners ability to recover depended on whether the hangers were in fact "trade fixtures" and thus personalty or improvements affixed to the realty. *Garvin v. City of Fayetteville*, 102 N.C. App. 121, 401 S.E.2d 133 (1991).

Facts alleging unfair claim settlement practices were sufficient to state a claim for unfair trade practices under § 58-63-15 so as to withstand a challenge under subdivision (b)(6) of this rule. *Miller v. Nationwide Mut. Ins. Co.*, 112 N.C. App. 295, 435 S.E.2d 537 (1993).

Allegations in amended complaint were sufficient to state a claim for relief based on a theory of negligence against an aircraft manufacturer in the preparation and publication of the information manual on mechanical functions. *Driver v. Burlington Avia-*

tion, Inc., 110 N.C. App. 519, 430 S.E.2d 476 (1993).

Or Where Complaint Discloses Unconditional Affirmative Defense. —

Once it is determined that the affirmative defense is properly before the trial court, dismissal under Rule 12(b)(6) on the grounds of the affirmative defense is proper if the complaint on its face reveals an insurmountable bar to recovery. *Johnson v. North Carolina DOT*, 107 N.C. App. 63, 418 S.E.2d 700 (1992).

Where an affirmative defense is raised for the first time in a motion to dismiss under subsection (b)(6) of this rule, the motion must ordinarily refer expressly to the affirmative defense relied upon. *Johnson v. North Carolina DOT*, 107 N.C. App. 63, 418 S.E.2d 700 (1992).

Absent a showing of prejudice, an affirmative defense may be raised by a Rule 12(b)(6) motion to dismiss. *Johnson v. North Carolina DOT*, 107 N.C. App. 63, 418 S.E.2d 700 (1992).

Where the nonmovant has not been surprised and has full opportunity to argue and present evidence on the affirmative defense, the failure of the motion filed under subsection (b)(6) of this rule to expressly refer to the affirmative defense will not bar consideration of the defense by the trial court. *Johnson v. North Carolina DOT*, 107 N.C. App. 63, 418 S.E.2d 700 (1992).

Appeal of Denial of Motion to Dismiss Heard. — Generally, the denial of a motion under subsection 12(b)(6) of this rule is interlocutory and not immediately appealable. However, where the court of appeals had proper jurisdiction over the other issues and because the parties desired an answer to a question which was fundamental in determining their rights, was also of public importance, and would aid State agencies in the performance of their duties, the court exercised its supervisory discretion to address on the merits the appeal. *Faulkenbury v. Teachers' & State Employees' Retirement Sys.*, 108 N.C. App. 357, 424 S.E.2d 420, cert. denied, 334 N.C. 162, 432 S.E.2d 358, aff'd per curiam, 335 N.C. 158, 436 S.E.2d 821 (1993).

Challenge to Congressional Redistricting Plan. — Action brought by the Republican Party of North Carolina, thirty registered Republicans, nine registered Democrats, and three citizens not affiliated with either party to chal-

lenge the State's federal congressional redistricting plan was dismissed with prejudice under Rule 12(b)(6) for failure to state a claim. *Pope v. Blue*, 809 F. Supp. 392 (W.D.N.C. 1992).

Failure to Allege Waiver of Immunity. — Where plaintiffs failed to allege in their complaint that defendant school board waived its immunity by the procurement of liability insurance to cover alleged negligence or tort, plaintiffs' complaint failed to state a cause of action as to defendant school board. *Gunter v. Anders*, 114 N.C. App. 61, 441 S.E.2d 167 (1994).

Improper to Consider Statute of Frauds. —

A defendant may not take advantage of the provisions of the statute of frauds by a motion to dismiss for failure to state a claim upon which relief could be granted, which must be pleaded as an affirmative defense. *Green v. Harbour*, 113 N.C. App. 280, 437 S.E.2d 719 (1993).

A claim should be dismissed under this rule where it appears that plaintiff is entitled to no relief under any statement of facts which could be proven; this will occur when there is a want of law to support a claim of the sort made, an absence of facts sufficient to make a good claim, or the disclosure of some fact which will necessarily defeat the claim. *Garvin v. City of Fayetteville*, 102 N.C. App. 121, 401 S.E.2d 133 (1991).

Review of Denial of Motion to Dismiss Not Available After Judgment on Merits. —

An unsuccessful movant under subsection (b)(6) of this rule may not seek review of denial of such motion on appeal from judgment on the merits against him. *Berrier v. Thrift*, 107 N.C. App. 356, 420 S.E.2d 206 (1992), cert. denied, 333 N.C. 254, 424 S.E.2d 918 (1993).

Claim for Concurrent Negligence. — For case holding plaintiff successfully stated a cause of action for concurrent negligence based upon the negligent acts of multiple defendants even though plaintiff could not allege which defendant had committed the injurious act, see *McMillan ex rel. McMillan v. Mahoney*, 99 N.C. App. 448, 393 S.E.2d 298 (1990).

Claim Against Parents for Negligence in Giving Air Rifles to Children. — For case holding plaintiff successfully stated a claim for negligence

against parents for giving air rifles to their minor children (where plaintiff's injury was sustained after being shot by one of the children), see *McMillan ex rel. McMillan v. Mahoney*, 99 N.C. App. 448, 393 S.E.2d 298 (1990).

B. Conversion of Motion to Dismiss to Summary Judgment Motion.

When Motion to Dismiss Converted, etc. —

In accord with sixth paragraph in main volume. See *King v. Durham County Mental Health Developmental Disabilities & Substance Abuse Auth.*, 113 N.C. App. 341, 439 S.E.2d 771 (1994).

XI. MOTION FOR JUDGMENT ON THE PLEADINGS.

Inapplicable to Post-Trial Motions.

— Motions under section (c) of this rule are pretrial motions requiring a review of the pleadings; they cannot be employed to test the validity of post-trial motions. *Scott v. Scott*, 106 N.C. App. 379, 416 S.E.2d 583 (1992).

Movant Must Prove Entitlement, etc. —

In accord with third paragraph of the main volume. See *Whitaker v. Clark*, 109 N.C. App. 379, 427 S.E.2d 142.

Motion for Judgment on the Pleadings Treated as (12)(b)(6) Motion. — Although respondent styled his motion as one for judgment on the pleadings pursuant to Rule 12(c), the court treated it as a motion for failure to state a claim because (1) the basis for the motion was that the petition failed to state sufficient facts as required by § 7A-289.25(6), and (2) a motion is treated according to its substance and not its label. In *re Quevedo*, 106 N.C. App. 574, 419 S.E.2d 158, appeal dismissed, 332 N.C. 483, 424 S.E.2d 397 (1992).

Refusal to Grant Judgment on Pleadings on Grounds of Governmental Immunity. — Although normally an appeal does not lie from the denial of a motion for judgment on the pleadings, an immediate appeal will lie under subsection (c), as well as subsection (b), where the trial court refuses to grant a judgment on the pleadings for the state on the grounds of governmental immunity. *Whitaker v. Clark*, 109 N.C. App. 379, 427 S.E.2d 142, cert. denied, 333 N.C. 795, 431 S.E.2d 31 (1993).

Rule 13. Counterclaim and crossclaim.

CASE NOTES

- I. In General.
- II. Counterclaims.

I. IN GENERAL.

Applied in *United States Fire Ins. Co. v. Southeast Airmotive Corp.*, 102 N.C. App. 470, 402 S.E.2d 466 (1991); *North Carolina Farm Bureau Mut. Ins. Co. v. Wingler*, 110 N.C. App. 397, 429 S.E.2d 759 (1993).

Cited in *Curtis v. Curtis*, 104 N.C. App. 625, 410 S.E.2d 917 (1991).

II. COUNTERCLAIMS.

What Claims Must Be Asserted. — This rule requires a party to assert as a counterclaim any claim arising out of the same transaction or occurrence as the pending action, "at peril of being barred" from asserting the claim in a later action. *Furr v. Noland*, 103 N.C. App. 279, 404 S.E.2d 885 (1991).

Where plaintiff proffered its counterclaims one year and three months after the filing of the complaint, by that time extensive discovery had already taken place, the new counterclaims would have required evidence of transactions which occurred three to five years earlier, and plaintiff sought to allege unfair and deceptive business practices for the first time, defendants were not to be penalized with more discovery and litigation and, for the first time, be exposed to treble damages because plaintiff was initially acting pro se and its first attor-

ney was dilatory. *House Healers Restorations, Inc. v. Ball*, 112 N.C. App. 783, 437 S.E.2d 383 (1993).

Counterclaims were compulsory where they arose out of business dealings of the parties covering over a two-year period and the expenditure of over one million dollars, and where defendants conceded that the counterclaims were compulsory in their brief by stating that they "arise out of the same series of transactions as the claims in the original complaints," and that "a reasonable person would have brought all of the claims on the original complaints." *House Healers Restorations, Inc. v. Ball*, 112 N.C. App. 783, 437 S.E.2d 383 (1993).

Voluntary Dismissal of Compulsory Counterclaim as Bar to Later Suit. — Plaintiff may not maintain action on a claim which was a compulsory counterclaim in a prior lawsuit and on which plaintiff took a voluntary dismissal. *Furr v. Noland*, 103 N.C. App. 279, 404 S.E.2d 885 (1991).

This rule and the doctrine of res judicata would be completely undermined if parties were allowed to voluntarily dismiss and then later re-file compulsory counterclaims. The judicial economy promoted by this rule would be lost. *Furr v. Noland*, 103 N.C. App. 279, 404 S.E.2d 885 (1991).

Rule 14. Third-party practice.

CASE NOTES

Dismissal of Third-Party Complaint. — In divorce action where husband filed an answer in which he asserted a counterclaim against wife and a third-party complaint against third-party defendant bank and where he alleged that wife fraudulently obtained an equity line of credit from the bank, secured by a deed of trust on the marital home, without his knowledge and consent and through his forged signature which was purportedly "witnessed" by bank employees, the court did not err in

dismissing the third-party complaint; wife's claims against husband were for an absolute divorce and for an equitable distribution of the marital property, and the bank could not be held liable to husband should an absolute divorce be granted; if the transaction resulting in the deed of trust is found to have been entered into without husband's consent and knowledge, the debts secured by the deed of trust would be held to be separate to wife; any misconduct by wife affecting the value of the property would

also be considered in distributing the property. *McCollum v. McCollum*, 102 N.C. App. 347, 401 S.E.2d 773 (1991).

Cited in *Haas v. Caldwell Sys.*, 98

N.C. App. 679, 392 S.E.2d 110 (1990); *Dick Parker Ford, Inc. v. Bradshaw*, 102 N.C. App. 529, 402 S.E.2d 878 (1991).

Rule 15. Amended and supplemental pleadings.

CASE NOTES

- I. In General.
- II. Amendments to Conform to Evidence.
- III. Relation Back of Amendments.
- IV. Supplemental Pleadings.

I. IN GENERAL.

As a general rule, once judgment is entered, amendment of the complaint is not allowed unless the judgment is set aside or vacated under § 1A-1, Rule 59 or § 1A-1, Rule 60. *Chrisalis Properties, Inc. v. Separate Quarters, Inc.*, 101 N.C. App. 81, 398 S.E.2d 628 (1990), discretionary review denied, 328 N.C. 570, 403 S.E.2d 509 (1991).

Plaintiffs Should Have Sought Leave to Amend Although Claim Raised in Answer. — Where the essence of plaintiffs' complaint and amended complaint was that defendants made unauthorized and unwarranted diversions of school bond proceeds to purposes other than those authorized by the bond resolution, namely for purchase and renovation of the Square D facility, and where neither complaint included an allegation that monies from other sources of revenue were improperly diverted, although defense, asserted in the answer of the Board of Education defendants, raised a claim of misappropriation of revenues other than bond proceeds, the trial court did not err in limiting denial of defendants' motions to dismiss to only the allegations relating to the propriety of the expenditure of school bond proceeds on the Square D facility; if plaintiffs desired to add a claim that defendants diverted sources of revenue other than school bond proceeds, plaintiffs should have sought leave to amend under this rule. *Moore v. Wykle*, 107 N.C. App. 120, 419 S.E.2d 164 (1992), cert. denied, 332 N.C. 666, 424 S.E.2d 405 (1992).

Trial court's denial of plaintiff's motion to amend upheld. *House of Raeford Farms, Inc. v. City of Raeford*, 104 N.C. App. 280, 408 S.E.2d 885 (1991).

Denial of Defendants' Motion to

Amend Answer. — Where defendants moved to amend their answer almost a full year from filing it and after both parties had conducted extensive discovery, and where, if the trial court had allowed amendment, plaintiffs would have been required to produce evidence of party's negligence approximately five years after the accident, at least on grounds of defendants' undue delay and undue prejudice to plaintiffs, the trial court was justified in denying defendants' motion to amend their answer. *Patrick v. Ronald Williams, Professional Ass'n*, 102 N.C. App. 355, 402 S.E.2d 452 (1991).

The trial court did not err by denying the plaintiffs' motion, etc. —

Where motion to amend was filed over a year after the original complaint, and the requested amendment purported to add a seventh cause of action, but the cause of action was ambiguous and no relief was requested, the trial court did not abuse its discretion in denying the motion to amend the complaint. *Outer Banks Contractors v. Daniels & Daniels Constr., Inc.*, 111 N.C. App. 725, 433 S.E.2d 759 (1993).

Where insufficient evidence existed to support defendant's claim, allowing defendant to amend its pleadings to include such a claim would be futile, the trial court did not err in denying defendant's motion to amend. *IRT Property Co. v. Papagayo, Inc.*, 112 N.C. App. 318, 435 S.E.2d 565 (1993), cert. granted, 335 N.C. 556, 441 S.E.2d 115 (1994).

Applied in County of Rutherford ex rel. Child Support Enforcement Agency ex rel. *Hedrick v. Whitener*, 100 N.C. App. 70, 394 S.E.2d 263 (1990); *Marina Food Assocs. v. Marina Restaurant, Inc.*, 100 N.C. App. 82, 394 S.E.2d 824 (1990); *News & Observer Publishing Co. v. Poole*, 330 N.C. 465, 412 S.E.2d 7 (1992);

Borg-Warner Acceptance Corp. v. Johnston, 107 N.C. App. 174, 419 S.E.2d 195 (1992); Munie v. Tangle Oaks Corp., 109 N.C. App. 336, 427 S.E.2d 149 (1993); Holloway v. Wachovia Bank & Trust Co., 109 N.C. App. 403, 428 S.E.2d 453 (1993); Freese v. Smith, 110 N.C. App. 28, 428 S.E.2d 841 (1993); Coble Cranes & Equip. Co. v. B & W Utils., Inc., 111 N.C. App. 910, 433 S.E.2d 464 (1993); Miller v. Talton, 112 N.C. App. 484, 435 S.E.2d 793 (1993); House Healers Restorations, Inc. v. Ball, 112 N.C. App. 783, 437 S.E.2d 383 (1993).

Quoted in Sharrard, McGee & Co. v. Suz's Software, Inc., 100 N.C. App. 428, 396 S.E.2d 815 (1990); Ford v. NCNB Corp., 104 N.C. App. 172, 408 S.E.2d 738 (1991).

Cited in Carolina-Atlantic Distributions, Inc. v. Boyce Insulation Co., 99 N.C. App. 577, 393 S.E.2d 337 (1990); In re P.E.P., 329 N.C. 692, 407 S.E.2d 505 (1991); Hoots v. Pryor, 106 N.C. App. 397, 417 S.E.2d 269 (1992); Westinghouse v. Hair, 107 N.C. App. 106, 418 S.E.2d 532 (1992); Golden Rule Ins. Co. v. Long, 113 N.C. App. 187, 439 S.E.2d 599 (1993).

II. AMENDMENTS TO CONFORM TO EVIDENCE.

Party who fails to object to evidence, etc. —

Where one of the "new" issues in an amended complaint was sufficiently pled in the complaint, defendant had notice and could not complain of its amendment; where evidence sustaining the other issues in the complaint did not

tend to support any properly pled issue and because defendant never specifically objected to that evidence as being outside the scope of the pleadings, he impliedly consented to trial on those issues. Smith v. Childs, 112 N.C. App. 672, 437 S.E.2d 500 (1993).

III. RELATION BACK OF AMENDMENTS.

Amendment to Adoption Petition Held Not to Relate Back. — Where termination order, later held to be invalid for failure to use due diligence in ascertaining the putative father's address, was filed with an adoption petition in lieu of the affidavit required by § 48-13, a subsequently filed affidavit did not relate back to the original filing date of the petition so as to cut off the rights of the putative father who filed a legitimization petition to § 49-10 before the affidavit was filed. In re Adoption of Clark, 327 N.C. 61, 393 S.E.2d 791 (1990).

IV. SUPPLEMENTAL PLEADINGS.

Supplemental Pleading to Show Change in Capacity in Which Plaintiff Sues. —

Where the original pleading gives sufficient notice of the transaction and occurrences upon which the claim is based, a supplemental pleading that merely changes the capacity in which the plaintiff sues relates back to the commencement of the action. Westinghouse v. Hair, 107 N.C. App. 106, 418 S.E.2d 532 (1992).

Rule 16. Pre-trial procedure; formulating issues.

CASE NOTES

Names of Witnesses and List of Exhibits. — With the exception of expert trial witnesses, whose identities are discoverable under 1A-1, Rule 26(b)(4), a party is not entitled to find out, by discovery, which witnesses his opponent intends to call, or the documents and exhibits a party opponent intends to present at the trial; instead, the names

of witnesses and lists of exhibits a party opponent intends to use at trial are obtainable through a pretrial conference. King v. Koucouliotes, 108 N.C. App. 751, 425 S.E.2d 462, cert. granted, 334 N.C. 163, 432 S.E.2d 361 (1993), discretionary review improvidently granted, 335 N.C. 164, 436 S.E.2d 132 (1993).

ARTICLE 4.

*Parties.***Rule 17. Parties plaintiff and defendant; capacity.**

(a) *Real party in interest.* — Every claim shall be prosecuted in the name of the real party in interest; but an executor, administrator, guardian, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in his own name without joining with him the party for whose benefit the action is brought; and when a statute of the State so provides, an action for the use or benefit of another shall be brought in the name of the State of North Carolina. No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

(b) *Infants, incompetents, etc.* —

- (1) *Infants, etc., Sue by Guardian or Guardian Ad Litem.* — In actions or special proceedings when any of the parties plaintiff are infants or incompetent persons, whether residents or nonresidents of this State, they must appear by general or testamentary guardian, if they have any within the State or by guardian ad litem appointed as hereinafter provided; but if the action or proceeding is against such guardian, or if there is no such known guardian, then such persons may appear by guardian ad litem.
- (2) *Infants, etc., Defend by Guardian Ad Litem.* — In actions or special proceedings when any of the defendants are infants or incompetent persons, whether residents or nonresidents of this State, they must defend by general or testamentary guardian, if they have any within this State or by guardian ad litem appointed as hereinafter provided; and if they have no known general or testamentary guardian in the State, and any of them have been summoned, the court in which said action or special proceeding is pending, upon motion of any of the parties, may appoint some discreet person to act as guardian ad litem, to defend in behalf of such infants, or incompetent persons, and fix and tax his fee as part of the costs. The guardian so appointed shall, if the cause is a civil action, file his answer to the complaint within the time required for other defendants, unless the time is extended by the court; and if the cause is a special proceeding, a copy of the complaint, with the summons, must be served on him. After 20 days' notice of the summons and complaint in the special proceeding, and after answer filed as above prescribed in the civil action, the court may proceed to final judgment as effectually and in the same manner as if there had been personal service upon the said infant or incompetent persons or defendants.

All orders or final judgments duly entered in any action or special proceeding prior to April 8, 1974, when any of

the defendants were infants or incompetent persons, whether residents or nonresidents of this State, and were defended therein by a general or testamentary guardian or guardian ad litem, and summons and complaint or petition in said action or special proceeding were duly served upon the guardian or guardian ad litem and answer duly filed by said guardian or guardian ad litem, shall be good and valid notwithstanding that said order or final judgment was entered less than 20 days after notice of the summons and complaint served upon said guardian or guardian ad litem.

- (3) Appointment of Guardian Ad Litem Notwithstanding the Existence of a General or Testamentary Guardian. — Notwithstanding the provisions of subsections (b)(1) and (b)(2), a guardian ad litem for an infant or incompetent person may be appointed in any case when it is deemed by the court in which the action is pending expedient to have the infant, or insane or incompetent person so represented, notwithstanding such person may have a general or testamentary guardian.
- (4) Appointment of Guardian Ad Litem for Unborn Persons. — In all actions in rem and quasi in rem and in all actions and special proceedings which involve the construction of wills, trusts and contracts or any instrument in writing, or which involve the determination of the ownership of property or the distribution of property, if there is a possibility that some person may thereafter be born who, if then living, would be a necessary or proper party to such action or special proceeding, the court in which said action or special proceeding is pending, upon motion of any of the parties or upon its own motion, may appoint some discreet person guardian ad litem to defend on behalf of such unborn person. Service upon the guardian ad litem appointed for such unborn person shall have the same force and effect as service upon such unborn person would have had if such person had been living. All proceedings by and against the said guardian ad litem after appointment shall be governed by all provisions of the law applicable to guardians ad litem for living persons.
- (5) Appointment of Guardian Ad Litem for Corporations, Trusts, or Other Entities Not in Existence. — In all actions which involve the construction of wills, trusts, contracts or written instruments, or the determination of the ownership of property or the disposition or distribution of property pursuant to the provisions of a will, trust, contract or written instrument, if such will, trust, contract or written instrument provides benefits for disposition or distribution of property to a corporation, a trust, or an entity thereafter to be formed for the purpose of carrying into effect some provision of the said will, trust, contract or written instrument, the court in which said action or special proceeding is pending, upon motion of any of the parties or upon its own motion, may appoint some discreet person guardian ad litem for such corporation, trust or other entity. Service upon the guardian ad litem appointed for such corporation, trust or other entity shall have the same force and effect as

service upon such corporation, trust or entity would have had if such corporation, trust or other entity had been in existence. All proceedings by and against the said guardian ad litem after appointment shall be governed by all provisions of the law applicable to guardians ad litem for living persons.

(6) Repealed by Sessions Laws 1981, c. 599, s. 1.

(7) Miscellaneous Provisions. — The provisions of this rule are in addition to any other remedies or procedures authorized or permitted by law, and it shall not be construed to repeal or to limit the doctrine of virtual representation or any other law or rule of law by which unborn persons or non-existent corporations, trusts or other entities may be represented in or bound by any judgment or order entered in any action or special proceeding. This rule shall apply to all pending actions and special proceedings to which it may be constitutionally applicable. All judgments and orders heretofore entered in any action in which a guardian or guardians ad litem have been appointed for any unborn person or persons or any non-existent corporations, trusts or other entities, are hereby validated as of the several dates of entry thereof in the same manner and to the full extent that they would have been valid if this rule had been in effect at the time of the appointment of such guardians ad litem; provided, however, that the provisions of this sentence shall be applicable only in such cases and to the extent to which the application thereof shall not be prevented by any constitutional limitation.

(c) *Guardian ad litem for infants, insane or incompetent persons; appointment procedure.* — When a guardian ad litem is appointed to represent an infant or insane or incompetent person, he must be appointed as follows:

- (1) When an infant or insane or incompetent person is plaintiff, the appointment shall be made at any time prior to or at the time of the commencement of the action, upon the written application of any relative or friend of said infant or insane or incompetent person or by the court on its own motion.
- (2) When an infant is defendant and service under Rule 4(j)(1)a is made upon him the appointment may be made upon the written application of any relative or friend of said infant, or, if no such application is made within 10 days after service of summons, upon the written application of any other party to the action or, at any time by the court on its own motion.
- (3) When an infant or insane or incompetent person is defendant and service can be made upon him only by publication, the appointment may be made upon the written application of any relative or friend of said infant, or upon the written application of any other party to the action, or by the court on its own motion, before completion of publication, whereupon service of the summons with copy of the complaint shall be made forthwith upon said guardian so appointed requiring him to make defense at the same time that the defendant is required to make defense in the notice of publication.

- (4) When an insane or incompetent person is defendant and service by publication is not required, the appointment may be made upon the written application of any relative or friend of said defendant, or upon the written application of any other party to the action, or by the court on its own motion, prior to or at the time of the commencement of the action, and service upon the insane or incompetent defendant may thereupon be dispensed with by order of the court making such appointment.

(d) *Guardian ad litem for persons not ascertained or for persons, trusts or corporations not in being.* — When under the terms of a written instrument, or for any other reason, a person or persons who are not in being, or any corporation, trust, or other legal entity which is not in being, may be or may become legally or equitably interested in any property, real or personal, the court in which an action or proceeding of any kind relative to or affecting such property is pending, may, upon the written application of any party to such action or proceeding or of other person interested, appoint a guardian ad litem to represent such person or persons not ascertained or such persons, trusts or corporations not in being.

(e) *Duty of guardian ad litem; effect of judgment or decree where party represented by guardian ad litem.* — Any guardian ad litem appointed for any party pursuant to any of the provisions of this rule shall file and serve such pleadings as may be required within the times specified by these rules, unless extension of time is obtained. After the appointment of a guardian ad litem under any provision of this rule and after the service and filing of such pleadings as may be required by such guardian ad litem, the court may proceed to final judgment, order or decree against any party so represented as effectually and in the same manner as if said party had been under no legal disability, had been ascertained and in being, and had been present in court after legal notice in the action in which such final judgment, order or decree is entered. (1967, c. 954, s. 1; 1969, c. 895, ss. 5, 6; 1971, c. 1156, ss. 3, 4; 1973, c. 1199; 1981, c. 599, s. 1; 1987, c. 550, s. 13.)

Editor's Note. — The section above the next to last sentence of subsection has been set out to correct an error in (b)(4).

CASE NOTES

I. In General.

III. Infants and Incompetents.

I. IN GENERAL.

Applied in *Westinghouse v. Hair*, 107 N.C. App. 106, 418 S.E.2d 532 (1992); *Lawrence v. Wetherington*, 108 N.C. App. 543, 423 S.E.2d 829 (1993).

Stated in *Union Grove Milling & Mfg. Co. v. Faw*, 109 N.C. App. 248, 426 S.E.2d 476 (1993).

Cited in *Powell v. Omli*, 110 N.C. App. 336, 429 S.E.2d 774 (1993).

III. INFANTS AND INCOMPETENTS.

The statute does not require, nor does it imply that it is the respondent's responsibility to ask for appointment of the guardian ad litem. *Richard v. Michha*, 110 N.C. App. 810, 431 S.E.2d 485 (1993).

Appeal from Order Appointing Guardian Ad Litem. — Plaintiff gave notice of appeal from an interlocutory

order, namely, one granting defendant's motions for the appointment of a guardian ad litem. As this order was not a final judgment, for plaintiff to have been entitled to appeal of right from the order, plaintiff was required to establish that the order either: (1) affected a substantial right, or (2) in effect determined the action and prevented a judgment from which appeal might be taken, or (3) discontinued the action, or (4) granted or refused a new trial. *Culton v. Culton*, 327 N.C. 624, 398 S.E.2d 323 (1990).

Standing to Challenge Appointment on Appeal. — Because he was not an aggrieved party, plaintiff had no standing to challenge on appeal trial court's order appointing a guardian ad litem for defendant. *Culton v. Culton*, 327 N.C. 624, 398 S.E.2d 323 (1990).

A guardian ad litem must always be appointed for a minor child in a termination, etc. —

In accord with the main volume. See *In re Finnican*, 104 N.C. App. 157, 408 S.E.2d 742 (1991).

Rule 18. Joinder of claims and remedies.

CASE NOTES

Stated in *Bockweg v. Anderson*, 333 N.C. 486, 428 S.E.2d 157 (1993).

Cited in *Corum v. University of N.C.*

ex rel. Bd. of Governors, 330 N.C. 761, 413 S.E.2d 276 (1992).

Rule 19. Necessary joinder of parties.

CASE NOTES

I. In General.

I. IN GENERAL.

Absence of necessary party does not merit dismissal. The absence of a necessary party under this rule does not merit dismissal of the action. *City of Albemarle v. Security Bank and Trust Co.*, 106 N.C. App. 75, 415 S.E.2d 96 (1992).

Husband of plaintiff in paternity suit was not a necessary party where a court had previously determined that he was not the father. Only the interests of the defendant, the alleged father, would be directly affected by the outcome of the litigation. *Lombroia v. Peek*, 107 N.C. App. 745, 421 S.E.2d 784 (1992).

A dispute as to the extinguishment of a subdivision easement by abandonment or adverse possession could not be resolved without the joinder of the grantor or his heirs, who retained fee title to the soil, and the record owners of lots in the subdivision, who had user rights in the easement. *Rice v. Randolph*, 96 N.C. App. 112, 384 S.E.2d 295 (1989).

The note above has been set out to correct a typographical error in the main pamphlet.

Lessor, Rather Than Assignee of

Lease, Held to Be Real Party in Interest in Action Against Lessees. —

Language of an assignment of a lease clearly established that lessor assigned only the right to rent payments, and plaintiff retained all other rights under the lease, including right to enforce lessees' tax obligation under lease; thus, the lessor was a real party in interest in action against lessees who defaulted under lease. *Martin v. Ray Lackey Enters., Inc.*, 100 N.C. App. 349, 396 S.E.2d 327 (1990).

Since assignee of lease received no right in the assignment to collect taxes from lessees, assignee's presence in the case brought by assignor/lessor against lessee for failure to pay taxes under lease was not necessary for a complete determination, and any judgment entered could not prejudice either assignees or the lessees. *Martin v. Ray Lackey Enters., Inc.*, 100 N.C. App. 349, 396 S.E.2d 327 (1990).

Applied in *Booher v. Frue*, 98 N.C. App. 585, 392 S.E.2d 105 (1990).

Cited in *Booher v. Frue*, 98 N.C. App. 570, 394 S.E.2d 816 (1990); *Powell v. Omli*, 110 N.C. App. 336, 429 S.E.2d 774 (1993).

Rule 20. Permissive joinder of parties.

CASE NOTES

I. In General.

I. IN GENERAL.

Applied in *Oxendine v. Bowers*, 100 N.C. App. 712, 398 S.E.2d 57 (1990).

Stated in *Swain v. Leahy*, 111 N.C. App. 884, 433 S.E.2d 460 (1993).

Rule 23. Class actions.

Legal Periodicals. —

For note, "Shareholder Derivative Suits Under the New North Carolina

Business Corporations Act," see 68 N.C. L. Rev. 1091 (1990).

CASE NOTES

I. In General.

I. IN GENERAL.

Federal Rules and Cases. — Both the North Carolina Rules of Civil Procedure and the Federal Rules of Civil Procedure contain a requirement that the complaint initiating a shareholder derivative action be verified under oath. *Alford v. Shaw*, 327 N.C. 526, 398 S.E.2d 445 (1990).

Because the present federal rule and its predecessors (which also contained a verification requirement) have been interpreted and discussed widely, the Supreme Court will turn to federal cases to elucidate the purpose behind this requirement. Certain aspects of this rule and the procedures in North Carolina governing derivative suits may differ from the federal approach; however, insofar as the purposes of certain of the federal and State rules are congruent, cases explaining federal rules are helpful. *Alford v. Shaw*, 327 N.C. 526, 398 S.E.2d 445 (1990).

This rule should receive a liberal construction, etc. —

In accord with main volume. See *Faulkenbury v. Teachers' & State Employees' Retirement Sys.*, 108 N.C. App. 357, 424 S.E.2d 420.

The requirements for a class action, etc. —

In accord with the main volume. See *Perry v. Union Camp Corp.*, 100 N.C. App. 168, 394 S.E.2d 681 (1990).

Court Must Make Findings of Fact Regarding Class Certification. —

Findings of fact are required by the trial court when rendering a judgment granting or denying class certification in order for the appellate courts to afford meaningful review under the abuse of discretion standard. Such findings must be made with sufficient specificity to allow effective appellate review. *Nobles v. First Carolina Communications, Inc.*, 108 N.C. App. 127, 423 S.E.2d 312 (1992), cert. denied, 333 N.C. 463, 427 S.E.2d 623 (1993).

Court Supervision of Communications With Potential Class Members Not Abuse of Discretion. — In a class action challenging interest rates that were charged in financing the purchase of mobile homes, trial court did not abuse its discretion in supervising communications with potential class members, as the trial court did not allow unlimited unsupervised communications with potential class members and restricted contact to the level it deemed appropriate at that stage of litigation. *Gibbons v. CIT Group/Sales Fin., Inc.*, 101 N.C. App. 502, 400 S.E.2d 104, cert. denied, 329 N.C. 496, 407 S.E.2d 856 (1991).

An order denying certification of a class action is appealable. *Nobles v. First Carolina Communications, Inc.*, 108 N.C. App. 127, 423 S.E.2d 312 (1992), cert. denied, 333 N.C. 463, 427 S.E.2d 623 (1993).

While an order denying a class certification is interlocutory, it is nonetheless immediately appealable as it affects a

substantial right of the unnamed plaintiffs. *Faulkenbury v. Teachers' & State Employees' Retirement Sys.*, 108 N.C. App. 357, 424 S.E.2d 420, cert. denied, 334 N.C. 162, 432 S.E.2d 358, aff'd per curium, 335 N.C. 158, 436 S.E.2d 821 (1993).

Review of Order Denying Class Certification. — The decision to grant or deny class certification rests within the sound discretion of the trial court; therefore, the appropriate standard for appellate review is whether the trial court's decision manifests an abuse of discretion. In this regard, an appellate court is bound by the court's findings of fact if they are supported by competent evidence. *Nobles v. First Carolina Communications, Inc.*, 108 N.C. App. 127, 423 S.E.2d 312 (1992), cert. denied, 333 N.C. 463, 427 S.E.2d 623 (1993).

Certification of Class Held Proper. — The trial court properly certified suit as a class action where the class was divided into six subclasses, three of these consisting of living persons who retired as vested members of the Retirement System, and three of these subclasses consisting of living beneficiaries, heirs, or personal representatives of persons comprising the first three subclasses in an action regarding calculation of disability payments. *Faulkenbury v. Teachers' & State Employees' Retirement Sys.*, 108 N.C. App. 357, 424 S.E.2d 420, cert. denied, 334 N.C. 162, 432 S.E.2d 358, aff'd per curium, 335 N.C. 158, 436 S.E.2d 821 (1993).

Procedure and Discovery in Shareholders' Derivative Actions. — For a case discussing interplay of rules and statutes governing procedure and discovery in shareholders' derivative action, particularly with respect to former § 55-55(c) (see now § 55-7-40(d)), this rule, and § 1A-1, Rules 12 and 56, see *Alford v. Shaw*, 327 N.C. 526, 398 S.E.2d 445 (1990).

Verification Requirement Not Jurisdictional. — Although complaint in shareholders' derivative suit was not properly verified, because § 1A-1, Rule 23(b) addresses the procedure to be followed in, and not the substantive elements of, a shareholder's derivative suit, plaintiffs' failure to comply with the verification requirement at the time the complaint was filed was not a jurisdictional defect. *Alford v. Shaw*, 327 N.C. 526, 398 S.E.2d 445 (1990).

Where Purposes of Verification Requirement Have Been Met. — Because this rule's verification requirement is not jurisdictional in nature, where the purposes behind the rule have been fulfilled by the time the objection to a defective or absent verification is lodged, dismissal or summary judgment in favor of defendants is not appropriate. *Alford v. Shaw*, 327 N.C. 526, 398 S.E.2d 445 (1990).

Defendants waived their objection to lack of proper verification in shareholders' derivative suit by failing to raise the issue of verification until the fourth time the case was heard in the appellate division. *Alford v. Shaw*, 327 N.C. 526, 398 S.E.2d 445 (1990).

Because defendants raised the verification issue for the first time in appellate briefs before the Supreme Court, over seven years after the complaint was filed, and after many years of active litigation of the suit, defendants waived their right to complain about verification. *Alford v. Shaw*, 327 N.C. 526, 398 S.E.2d 445 (1990).

Quoted in *In re Triscari Children*, 109 N.C. App. 285, 426 S.E.2d 435 (1993).

Cited in *Granville County Bd. of Comm'rs v. North Carolina Hazardous Waste Mgt. Comm'n*, 329 N.C. 615, 407 S.E.2d 785 (1991).

Rule 24. Intervention.

CASE NOTES

I. In General.

I. IN GENERAL.

Applied in *State ex rel. Long v. Interstate Cas. Ins. Co.*, 106 N.C. App. 470, 417 S.E.2d 296 (1992); *Surles v. Surles*, 113 N.C. App. 32, 437 S.E.2d 661 (1993).

Stated in *State ex rel. Long v. Interstate Cas. Ins. Co.*, 106 N.C. App. 470, 417 S.E.2d 296 (1992).

Cited in *Sparks v. Nationwide Mut. Ins. Co.*, 99 N.C. App. 148, 392 S.E.2d

415 (1990); In re P.E.P., 329 N.C. 692,
407 S.E.2d 505 (1991).

Rule 25. Substitution of parties upon death, incompetency or transfer of interest; abatement.

CASE NOTES

I. In General.

I. IN GENERAL.

Cited in Foy v. Hunter, 106 N.C. App.
614, 418 S.E.2d 299 (1992).

ARTICLE 5.

Depositions and Discovery.

Rule 26. General provisions governing discovery.

Legal Periodicals. —
For article, "Hope Over Experience:
Mandatory Informal Discovery and the

Politics of Rulemaking," see 69 N.C.L.
Rev. 795 (1991).

CASE NOTES

I. In General.

II. Scope of Discovery Generally.

I. IN GENERAL.

The purpose and intent of this rule, etc. —

The purpose behind section (e) of this rule is to prevent a party with discoverable information from making untimely, evasive, or incomplete responses to requests for discovery. Bumgarner v. Reneau, 332 N.C. 624, 422 S.E.2d 686 (1992).

The imposition of sanctions under § 1A-1, Rule 37, etc. —

In accord with the main volume. See Bumgarner v. Reneau, 332 N.C. 624, 422 S.E.2d 686 (1992).

Sanction for Taking Deposition in Violation of Rules. — Striking of the notice of the taking of a deposition and prohibiting its further use was a reasonable sanction for a deposition procured in violation of deposition rules, even though it was defendant's counsel, and not defendant itself, who committed the acts giving rise to the sanction. Turner

v. Duke Univ., 101 N.C. App. 276, 399 S.E.2d 402, cert. denied, 329 N.C. 504, 407 S.E.2d 552 (1991).

Sanctions for Improper Discovery.

— A motion under the more specific rule governing sanctions in the context of discovery responses is the proper avenue for sanctioning improper conduct relative to discovery. Brooks v. Giesey, 334 N.C. 303, 432 S.E.2d 339 (1993).

Sanctions Under Subsection (g). —

The imposition of sanctions for discovery abuses under subsection (g) informs offending counsel of exactly what action is being sanctioned. This process alleviates any due process concerns an attorney might raise by claiming not to know which of his or her actions merit sanctions. Brooks v. Giesey, 334 N.C. 303, 432 S.E.2d 339 (1993).

Applied in Jennings v. Jessen, 103 N.C. App. 739, 407 S.E.2d 264 (1991); Powers v. Parish, 104 N.C. App. 400, 409 S.E.2d 725 (1991).

Stated in Cantwell v. Cantwell, 109 N.C. App. 395, 427 S.E.2d 129 (1993).

Cited in Prince v. Duke Univ., 326 N.C. 787, 392 S.E.2d 388 (1990); Cantwell v. Cantwell, 109 N.C. App. 395, 427 S.E.2d 129 (1993); Pugh v. Pugh, 113 N.C. App. 375, 438 S.E.2d 214 (1994); Clark v. Perry, 114 N.C. App. 297, 442 S.E.2d 57 (1994).

II. SCOPE OF DISCOVERY GENERALLY.

The relevancy test for discovery, etc. —

The test of relevancy under subsection (b) of this rule differs from the more stringent test of relevancy under § 8C-1, Rule 401. Adams v. Lovette, 105 N.C. App. 23, 411 S.E.2d 620, aff'd, 332 N.C. 659, 422 S.E.2d 575 (1992).

Records Irrelevant for Discovery Purposes. — Whether or not plaintiff's replacement had a relationship with a high school student during his previous employment, the complete student records at high school and school personnel records were irrelevant to whether defendants intentionally inflicted emotional distress on plaintiff, constructively and wrongfully discharged her, or maliciously interfered with her contract; therefore, the trial court did not abuse its discretion in denying motion to compel discovery. Wagoner v. Elkin City Schs.' Bd. of Educ., 113 N.C. App. 579, 440 S.E.2d 119 (1994).

The determination of whether and when to convene a discovery conference is a matter left to the discretion of the trial judge. Gibbons v. CIT Group/Sales Fin., Inc., 101 N.C. App. 502, 400 S.E.2d 104, cert. denied, 329 N.C. 496, 407 S.E.2d 856 (1991).

Discovery Plan Required for Discovery Conference. — While § 1A-1, Rule 26(f) requires the court to impose a discovery plan if a discovery conference is held, court is not obligated to impose discovery plan if no discovery conference has been held. Gibbons v. CIT Group/Sales Fin., Inc., 101 N.C. App. 502, 400 S.E.2d 104, cert. denied, 329 N.C. 496, 407 S.E.2d 856 (1991).

Other Witnesses and Exhibits. — With the exception of expert trial witnesses, whose identities are discoverable under the provisions of subdivision (b)(4) of this rule, a party is not entitled to find out, by discovery, which witnesses his opponent intends to call, or the documents and exhibits a party opponent intends to present at the trial; instead, the names of witnesses and lists of exhibits a party opponent intends to use at trial are obtainable through the pretrial conference. King v. Koucouliotes, 108 N.C. App. 751, 425 S.E.2d 462, cert. granted, 334 N.C. 163, 432 S.E.2d 361 (1993), discretionary review improvidently granted, 335 N.C. 164, 436 S.E.2d 132 (1993).

Rule 28. Persons before whom depositions may be taken.

CASE NOTES

I. In General.

I. IN GENERAL.

Applied in State v. Thompson, 110 N.C. App. 217, 429 S.E.2d 590 (1993).

Cited in Kearney v. County of Durham, 99 N.C. App. 349, 393 S.E.2d 129 (1990); Pugh v. Pugh, 111 N.C. App. 118, 431 S.E.2d 873 (1993).

Rule 32. Use of depositions in court proceedings.

CASE NOTES

Use of Depositions at Trial Stage Limited. —

Oral testimony is more desirable, but a deposition may be used if a witness is unavailable. *Investors Title Ins. Co. v. Herzig*, 330 N.C. 681, 413 S.E.2d 268 (1992).

Admittance of Portion of Deposition Does Not Require Admittance of Entire Deposition. — Trial court did not err in allowing in evidence selected portions of each of the two plaintiffs' depositions and in overruling plaintiffs' motions that the entire depositions be admitted. Plaintiffs' reliance on this section was misplaced since plaintiffs alleged a right to have the entire depositions admitted once a portion had been offered into evidence; this section allows the admission of "any other part which is relevant to the part introduced."

Lenins v. K-Mart Corp., 98 N.C. App. 590, 391 S.E.2d 843 (1990).

Incarcerated Parent in Parental Termination Proceeding. — When an incarcerated parent is denied transportation to the hearing in contested termination cases, the better practice is for the court, when so moved, to provide the funds necessary for the deposing of the incarcerated parent. The parent's deposition, combined with representation by counsel at the hearing, will ordinarily provide sufficient participation by the incarcerated parent so as to reduce the risk of error attributable to his absence to a level consistent with due process. *In re Quevedo*, 106 N.C. App. 574, 419 S.E.2d 158, appeal dismissed, 332 N.C. 483, 424 S.E.2d 397 (1992).

Cited in *Hassett v. Dixie Furn. Co.*, 104 N.C. App. 684, 411 S.E.2d 187 (1991).

Rule 34. Production of documents and things and entry upon land for inspection and other purposes.

CASE NOTES

I. In General.

I. IN GENERAL.

Asserting Work Product Privilege Insufficient Without Written Objection or Protective Order. — Assertion by counsel of a work product privilege to the tapes and transcripts was insufficient to meet the requirements of this rule where he did not file a written ob-

jection nor seek a protective order, and his failure to do either entitled the opposing party to proceed under Rule 37(d). *Pugh v. Pugh*, 113 N.C. App. 375, 438 S.E.2d 214 (1994).

Applied in *Kirkhart v. Saieed*, 107 N.C. App. 293, 419 S.E.2d 580 (1992).

Rule 36. Requests for admission; effect of admission.

CASE NOTES

Failure to Respond to Plaintiff's Request. — By failing to respond to plaintiff's request for admissions, defendants allowed the facts in question to be judicially established. *Town of Chapel*

Hill v. Burchette, 100 N.C. App. 157, 394 S.E.2d 698 (1990).

Cited in *McKinney v. Avery Journal, Inc.*, 99 N.C. App. 529, 393 S.E.2d 295 (1990).

Rule 37. Failure to make discovery; sanctions.**CASE NOTES**

Information Irrelevant for Discovery Purposes. — Whether or not plaintiff's replacement had a relationship with a high school student during his previous employment, the complete student records at high school and school personnel records were irrelevant to whether defendants intentionally inflicted emotional distress on plaintiff, constructively and wrongfully discharged her, or maliciously interfered with her contract; therefore, the trial court did not abuse its discretion in denying motion to compel discovery. *Wagoner v. Elkin City Schs.' Bd. of Educ.*, 113 N.C. App. 579, 440 S.E.2d 119 (1994).

Responding Party May Not Unilaterally Interpret Relevant Scope. — The responding party may not unilaterally "interpret" the relevant scope of its response and only provide that information it considers discoverable. *Roan-Baker v. Southeastern Hosp. Supply Corp.*, 99 N.C. App. 30, 392 S.E.2d 663 (1990).

The trial judge has broad discretion, etc. —

The choice of sanctions under Rule 37 is within the trial court's discretion and will not be overturned on appeal absent a showing of abuse of that discretion. *Brooks v. Giesey*, 106 N.C. App. 586, 418 S.E.2d 236 (1992), *affd*, 334 N.C. 303, 432 S.E.2d 339 (1993).

A trial court must consider less severe sanctions before dismissing a plaintiff's complaint under subsection (d) of this rule. *Goss v. Battle*, 111 N.C. App. 173, 432 S.E.2d 156 (1993).

Sanctions Imposed on Attorney. — Trial court was justified in imposing sanctions on attorney where notice of plaintiff's deposition was actually sent to her office, and court of appeals could only assume that plaintiff was unaware that she needed to bring any documents with her because her counsel never informed her of such. *Pugh v. Pugh*, 113 N.C. App. 375, 438 S.E.2d 214 (1994).

The proximity of the discovery abuse to the date of trial is one factor the trial court may consider when determining whether or not to award sanctions. *Roan-Baker v. Southeastern Hosp. Supply Corp.*, 99 N.C. App. 30, 392 S.E.2d 663 (1990).

Party Not Precluded from Presenting Witnesses and Exhibits at Trial.

— Where plaintiff, in a deposition, specifically requested from the defendant the names of his trial witnesses and a list of his trial exhibits, but made no showing that he had a special need for defendant's list of witnesses and exhibits ten months prior to trial, the information sought was not discoverable and defendant's failure to provide such information could not preclude him from presenting witnesses and exhibits at the trial. *King v. Koucouliotes*, 108 N.C. App. 751, 425 S.E.2d 462, cert. granted, 334 N.C. 163, 432 S.E.2d 361 (1993), discretionary review improvidently granted, 335 N.C. 164, 436 S.E.2d 132 (1993).

Movant Need Not Show Prejudice to Obtain Sanctions. — This rule does not require the movant to show that it was prejudiced by the nonmovant's actions in order to obtain sanctions for abuse of discovery. *Roan-Baker v. Southeastern Hosp. Supply Corp.*, 99 N.C. App. 30, 392 S.E.2d 663 (1990).

Default Judgment. — Under this rule, where an answer to the complaint has been filed, and a party fails to answer requested discovery, the opposing party may move the court to order the answer stricken, and if granted, for entry of default judgment against the disobedient party. *O'Neal v. Murray*, 105 N.C. App. 102, 411 S.E.2d 628 (1992).

Prohibiting Introduction of Evidence as Sanction. — The sanction provision of this rule permits the court to make such orders as are "just" upon a party's failure to obey an order to provide or permit discovery, including refusing to permit the disobedient party to introduce the matters in question into evidence. *Bumgarner v. Reneau*, 332 N.C. 624, 422 S.E.2d 686 (1992).

Sanction Overturned Only for, etc. —

Although the sanctions imposed were severe, they are among those expressly authorized by statute; absent specific evidence of injustice, the court of appeals could not hold they constitute an abuse of discretion. *Roan-Baker v. Southeastern Hosp. Supply Corp.*, 99 N.C. App. 30, 392 S.E.2d 663 (1990).

Applied in *Jennings v. Jessen*, 103 N.C. App. 739, 407 S.E.2d 264 (1991); *Smitheman ex rel. Godwin v. National Presto Indus., Inc.*, 109 N.C. App. 636, 428 S.E.2d 465 (1993).

Quoted in *In re Vestal*, 104 N.C. App. 739, 411 S.E.2d 167 (1991).

Cited in *Kirkhart v. Saieed*, 107 N.C. App. 293, 419 S.E.2d 580 (1992); *North Carolina Farm Bureau Mut. Ins. Co. v. Wingler*, 110 N.C. App. 397, 429 S.E.2d 759 (1993).

ARTICLE 6.

Trials.

Rule 38. Jury trial of right.

CASE NOTES

Stated in *Wachovia Bank & Trust Co. v. Templeton Oldsmobile-Cadillac-Pontiac, Inc.*, 109 N.C. App. 352, 427 S.E.2d 629 (1993).

Cited in *Delta Marine, Inc. v. Whaley*, 813 F. Supp. 414 (E.D.N.C. 1993).

Rule 40. Assignment of cases for trial; continuances.

CASE NOTES

I. In General.

II. Calendaring of Actions.

I. IN GENERAL.

Applied in *Alexander v. Wilkerson*, 99 N.C. App. 340, 392 S.E.2d 765 (1990).

Stated in *Broome v. Broome*, 112 N.C. App. 823, 436 S.E.2d 918 (1993).

II. CALENDARING OF ACTIONS.

The senior Superior Court judge "may provide by rule for the calendaring of actions for trial in the superior court division . . .". *Lomax v. Shaw*, 101 N.C. App. 560, 400 S.E.2d 97 (1991).

The superior court judge was well

within the bounds of the court's inherent authority to manage the case docket when he struck defendant's answer as a sanction for willful failure to execute agreed settlement because defendants offered no plausible excuse as to why they did not execute the two paragraph consent judgment, saying only that they did not understand it and in addition judge gave notice that failure to file the consent order would result in the imposition of sanctions. *Lomax v. Shaw*, 101 N.C. App. 560, 400 S.E.2d 97 (1991).

Rule 41. Dismissal of actions.

CASE NOTES

I. In General.

II. Voluntary Dismissal.

III. Involuntary Dismissal.

A. In General.

B. Failure to Prosecute or to Comply with Rules or Orders.

C. Failure to Show Right to Relief.

I. IN GENERAL.

Requirement of Detailed Findings.

— The requirement of appropriately detailed findings is designed to dispose of the issues raised by the pleadings and to allow the appellate courts to perform their proper function in the judicial system. *Mashburn v. First Investors Corp.*, 102 N.C. App. 560, 402 S.E.2d 860 (1991).

Applied in *Myers v. Barringer*, 101 N.C. App. 168, 398 S.E.2d 615 (1990); *Lutz v. Lutz*, 101 N.C. App. 298, 399 S.E.2d 385; *Woodard v. North Carolina Local Governmental Employees' Retirement Sys.*, 108 N.C. App. 378, 424 S.E.2d 431 (1993); *Thompson v. Hank's of Carolina, Inc.*, 109 N.C. App. 89, 426 S.E.2d 278 (1993); *In re Becker*, 111 N.C. App. 85, 431 S.E.2d 820 (1993); *Moore v. Pate*, 112 N.C. App. 833, 437 S.E.2d 1 (1993).

Quoted in *Kirby Bldg. Sys. v. McNiel*, 327 N.C. 234, 393 S.E.2d 827 (1990); *Marlowe v. Clark*, 112 N.C. App. 181, 435 S.E.2d 354 (1993).

Cited in *Surratt v. Newton*, 99 N.C. App. 396, 393 S.E.2d 554 (1990); *Estridge v. Ford Motor Co.*, 101 N.C. App. 716, 401 S.E.2d 85 (1991); *Furr v. Noland*, 103 N.C. App. 279, 404 S.E.2d 885 (1991); *Hull v. Oldham*, 104 N.C. App. 29, 407 S.E.2d 611 (1991); *Brockwell v. Lake Gaston Sales & Serv.*, 105 N.C. App. 226, 412 S.E.2d 104 (1992); *Hoots v. Pryor*, 106 N.C. App. 397, 417 S.E.2d 269 (1992); *Foy v. Hunter*, 106 N.C. App. 614, 418 S.E.2d 299 (1992); *Brandenburg Land Co. v. Champion Int'l Corp.*, 107 N.C. App. 102, 418 S.E.2d 526 (1992); *Faulkenbury v. Teachers' & State Employees' Retirement Sys.*, 108 N.C. App. 357, 424 S.E.2d 420 (1993); *Nello L. Teer Co. v. Orange County*, 810 F. Supp. 679 (M.D.N.C. 1992); *Pieper v. Pieper*, 108 N.C. App. 722, 425 S.E.2d 435 (1993); *Lowry v. Duke Univ. Medical Ctr.*, 109 N.C. App. 83, 425 S.E.2d 739 (1993); *Bockweg v. Anderson*, 333 N.C. 486, 428 S.E.2d 157 (1993); *Kaplan v. Prolife Action League*, 111 N.C. App. 1, 431 S.E.2d 828 (1993); *Stegall v. Stegall*, 110 N.C. App. 655, 430 S.E.2d 460 (1993); *Goss v. Battle*, 111 N.C. App. 173, 432 S.E.2d 156 (1993); *Gunter v. Anders*, 114 N.C. App. 61, 441 S.E.2d 167 (1994).

II. VOLUNTARY DISMISSAL.

How Filing Requirements of Subdivision (a)(1)(i) May Be Met. — No

means other than oral notice in open court have been allowed to substitute for the filing requirements of subdivision (a)(1)(i) of this rule. *Johnson v. Hutchens*, 103 N.C. App. 384, 405 S.E.2d 597 (1991).

Contact with defendant's attorney by telephone or mail concerning voluntary dismissal does not satisfy the filing requirements of subdivision (a)(1)(i) of this rule. *Johnson v. Hutchens*, 103 N.C. App. 384, 405 S.E.2d 597 (1991).

A plaintiff is free to abandon an alleged or potential claim against another party at any time. *Carter v. Clowers*, 102 N.C. App. 247, 401 S.E.2d 662 (1991).

Under subdivision (a)(1) of this rule, plaintiff may voluntarily dismiss his suit, without order of the court, by filing a notice of dismissal at any time before resting his case. *Carter v. Clowers*, 102 N.C. App. 247, 401 S.E.2d 662 (1991).

The two-dismissal rule applies only when the plaintiff has twice dismissed an action based on or including the same claim, and, as plaintiffs dismissed their first action only once, the two-dismissal rule did not apply; plaintiffs' voluntary dismissal of their own claim against one defendant did not constitute an adjudication on the merits pursuant to subdivision (a)(1) and plaintiffs were not barred from bringing action for crop damage. *Hopkins v. Ciba-Geigy Corp.*, 111 N.C. App. 179, 432 S.E.2d 142 (1993).

A voluntary dismissal is effective whether or not a court has jurisdiction. *Carter v. Clowers*, 102 N.C. App. 247, 401 S.E.2d 662 (1991).

No Court Action Required. —

A notice of dismissal pursuant to subdivision (a)(1) of this section is an action taken by the plaintiff ending the suit, and no action of the court is necessary to give the notice its full effect. *Carter v. Clowers*, 102 N.C. App. 247, 401 S.E.2d 662 (1991).

Amendment Pursuant to § 1A-1, Rule 60(b). — A voluntary dismissal under subsection (a)(1) of this rule can be amended pursuant to § 1A-1, Rule 60(b). *Newberry Metal Masters Fabricators, Inc. v. Mitek Indus., Inc.*, 333 N.C. 250, 424 S.E.2d 383 (1993).

Dismissal after Entry of Final Order Ineffective. — Purported voluntary dismissal of petition for attorney's fees was of no legal efficacy where it came after the clerk entered a final order on the petition. *In re Estate of Tucci*, 104

N.C. App. 142, 408 S.E.2d 859 (1991), cert. dismissed, 331 N.C. 748, 417 S.E.2d 236 (1992).

This rule provides that dismissal is without prejudice, unless otherwise stated, allowing plaintiff to commence a new action based on the same claim within one year. *Carter v. Clowers*, 102 N.C. App. 247, 401 S.E.2d 662 (1991).

Where plaintiff's first voluntarily-dismissed suit, etc. —

A voluntary dismissal of negligence action without prejudice did not toll the statute of limitations in a case in which the plaintiff, seeing the statute of limitations about to run, received an order extending the time for filing a complaint but failed to serve defendant with civil summons and the order. The defective service of process discontinued plaintiff's original action, and the trial court properly treated the voluntary dismissal as if it had never been filed and the statute of limitations as if it had not been tolled. *Latham v. Cherry*, 111 N.C. App. 871, 433 S.E.2d 478 (1993), cert. denied, 335 N.C. 556, 441 S.E.2d 116 (1994).

"Second dismissal" rule does not make voluntary dismissals by stipulation or order of court, etc. —

The "second dismissal" rule does not apply to make voluntary dismissals by stipulation or by order of court "on the merits," even when they follow a previously filed notice of voluntary dismissal. *North Carolina R.R. v. Ferguson Bldrs. Supply*, 103 N.C. App. 768, 407 S.E.2d 296 (1991).

Voluntary Dismissal as Final Adjudication. — Once the one-year period for refileing an action has elapsed and the action can no longer be resurrected, the voluntary dismissal acts as a final adjudication for purposes of § 1A-1, Rule 60(b). *Robinson v. General Mills Restaurants, Inc.*, 110 N.C. App. 633, 430 S.E.2d 696, cert. granted, 334 N.C. 623, 435 S.E.2d 340, 341 (1993).

When One-Year Period Begins to Run. —

When a trial court instructs, or expressly permits, a plaintiff who has given oral notice of voluntary dismissal pursuant to subsection (a)(1) of this rule to file written notice to the same effect at a later date during the session of court at which oral notice was given, and plaintiff files written notice accordingly, the one-year period for refileing provided by the rule begins to run when written notice is filed. *Thompson v.*

Newman, 331 N.C. 709, 417 S.E.2d 224 (1992).

Lien May Not Be Cancelled. — In light of the requirement of § 44A-16(4) that a judgment must be filed to discharge a lien, a lien may not be cancelled by taking a voluntary dismissal without prejudice. *Newberry Metal Masters Fabricators, Inc. v. Mitek Indus., Inc.*, 333 N.C. 250, 424 S.E.2d 383 (1993).

A party may refile an action to perfect a lien after taking a voluntary dismissal without prejudice pursuant to subsection (a)(1) of this rule. *Newberry Metal Masters Fabricators, Inc. v. Mitek Indus., Inc.*, 333 N.C. 250, 424 S.E.2d 383 (1993).

Equitable Distribution Claim. — Where defendant sets up a claim for affirmative relief against a plaintiff arising out of the same transactions alleged by the plaintiff, plaintiff cannot take a voluntary dismissal without the consent of the defendant; however, plaintiff's original claim may be barred by law if the court finds that separation agreements fully disposed of the parties' rights arising out of the marriage, and thus bar an equitable distribution claim. *Rabon v. Rabon*, 102 N.C. App. 452, 402 S.E.2d 461 (1991).

Trial court did not have authority to reaffirm divorce decree and reserve for future resolution the issue of equitable distribution; since the trial court did not set aside the divorce but rather attempted to nullify the consequences of defendant's failure to assert her claim for equitable distribution prior to the entry of judgment of divorce, the order failed; even if the court effectively set aside, briefly, the divorce decree itself and then immediately reinstated the divorce decree with a reservation of an equitable distribution claim, the reservation of the equitable distribution claim would be a legal nullity because plaintiff voluntarily dismissed his equitable distribution claim and defendant did not, during the time the divorce was arguably set aside, file an answer, counterclaim or separate action requesting equitable distribution. *Carter v. Carter*, 102 N.C. App. 440, 402 S.E.2d 469 (1991).

Where at the time the plaintiff filed his voluntary dismissal of his claim for equitable distribution, the defendant had filed no pleadings, plaintiff was free to enter his voluntary dismissal of his equitable distribution claim without any

notice to the defendant or the defendant's consent. *Carter v. Carter*, 102 N.C. App. 440, 402 S.E.2d 469 (1991).

Attorneys' Fees. — Where the plaintiffs filed a voluntary dismissal with prejudice pursuant to this rule, the trial court was not deprived of jurisdiction to determine the appropriateness of attorney fees under § 1A-1, Rule 11 or § 6-21.5. *Bryson v. Sullivan*, 102 N.C. App. 1, 401 S.E.2d 645 (1991), modified on other grounds, 330 N.C. 644, 412 S.E.2d 327 (1992).

Collateral Issues. — Attorneys' fee requests under § 1A-1, Rule 11 raise collateral issues which often require consideration by the trial court after the action has been terminated, and a voluntary dismissal under this rule does not deprive the trial court of jurisdiction to determine these collateral issues. *Higgins v. Patton*, 102 N.C. App. 301, 401 S.E.2d 854 (1991), overruled on other grounds, *Bryson v. Sullivan*, 330 N.C. 644, 412 S.E.2d 327 (1992).

Attorneys' fee requests under § 1A-1, Rule 11 and § 6-21.5 raise collateral issues which often require consideration by the trial court after the action has been terminated, and a voluntary dismissal under this rule does not deprive the trial court of jurisdiction to determine these collateral issues. To hold otherwise would allow a litigant or attorney to "purge his violation of § 1A-1, Rule 11 or § 6-21.5 merely by taking a dismissal, and thereby lose all incentive to stop, think and investigate more carefully before serving and filing papers." *Bryson v. Sullivan*, 102 N.C. App. 1, 401 S.E.2d 645 (1991), modified on other grounds, 330 N.C. 644, 412 S.E.2d 327 (1992).

Rescission Offer. — Judgment that simply made the bare conclusion that an investment firm tendered a "valid" rescission offer and that, therefore, the investor was barred from bringing suit under the provisions of subdivision (g)(1) of § 78A-56 did not rise to the level of separate findings of fact and conclusions of law; the judgment, therefore, did not comport with the requirements of this rule and § 1A-1, Rule 52(a). *Mashburn v. First Investors Corp.*, 102 N.C. App. 560, 402 S.E.2d 860 (1991).

Court Costs. — Where plaintiff takes a voluntary dismissal pursuant to this rule, no suit is pending thereafter on which the court could make a final order. However, the trial court retains authority to apportion and tax court costs.

Bryson v. Sullivan, 102 N.C. App. 1, 401 S.E.2d 645 (1991), modified on other grounds, 330 N.C. 644, 412 S.E.2d 327 (1992).

Savings Provision. — The one-year savings provision of subdivision (a)(1) of this rule applies when plaintiffs and defendants stipulate to a voluntary dismissal without prejudice of an action in a federal district court sitting in North Carolina and plaintiffs file the same action within the one-year period in a North Carolina state court. *Bockweg v. Anderson*, 328 N.C. 436, 402 S.E.2d 627 (1991).

III. INVOLUNTARY DISMISSAL.

A. In General.

Involuntary Dismissal May Be Used to Sanction, etc. —

Under subsection (b) of this rule, a trial court may enter sanctions for failure to prosecute only where the plaintiff or his attorney "manifests and intention to thwart the progress of the action to its conclusion" or "fails to progress the action towards its conclusion" by engaging in some delaying tactic. Whether a plaintiff or his attorney has manifested an intent to thwart the progress of an action or has engaged in some delaying tactic may be inferred from the facts surrounding the delay in the prosecution of the case. The sanctions may be entered against either the represented party or the attorney, even when the attorney is solely responsible for the delay or violation. *Foy v. Hunter*, 106 N.C. App. 614, 418 S.E.2d 299 (1992).

Function of Judge. —

In accord with first paragraph in the main volume. See *C.F.R. Foods, Inc. v. Randolph Dev. Co.*, 107 N.C. App. 584, 421 S.E.2d 386, cert. denied, 333 N.C. 166, 424 S.E.2d 906 (1992).

In accord with second paragraph in the main volume. See *C.F.R. Foods, Inc. v. Randolph Dev. Co.*, 107 N.C. App. 584, 421 S.E.2d 386, cert. denied, 333 N.C. 166, 424 S.E.2d 906 (1992).

There is no exception under section (b), etc. —

The savings provision of subsection (b) did not apply to allow plaintiff an additional year to file in state court when the federal court order dismissing his action did not specify additional time within which to file. *Clark v. Velsicol Chem. Corp.*, 110 N.C. App. 803, 431 S.E.2d 227, cert. granted, 334 N.C. 687, 436 S.E.2d 371 (1993).

Petition for Certiorari. — Commencing an action in federal court did not toll negligence statute of limitation and did not keep it tolled until the United States Supreme Court ruled on a petition for certiorari to review an involuntary dismissal of that federal action. *Clark v. Velsicol Chem. Corp.*, 110 N.C. App. 803, 431 S.E.2d 227, cert. granted, 334 N.C. 687, 436 S.E.2d 371 (1993).

B. Failure to Prosecute or to Comply with Rules or Orders.

Dismissal for Failure to Prosecute Held Error. — Where nothing in the record indicated that the plaintiffs failed to assist or cooperate with their attorneys or that they were not diligent in prosecuting their action, the entry of sanctions against either the plaintiffs or their attorney could not be upheld on the ground of the plaintiffs' failure to prosecute. *Foy v. Hunter*, 106 N.C. App. 614, 418 S.E.2d 299 (1992).

The trial court did not abuse its discretion, etc. —

Where trial court found that corporate officer's failure to account made it impossible for receivers to defend against claims of that officer and his wife against the corporation in liquidation, trial court was authorized, pursuant to section (b) of this rule, to dismiss the claims of the officer and his wife on their receivership in the event that the corporate officer failed to provide an accounting within 30 days of the effective date of the court's order. *Lowder v. All Star Mills, Inc.*, 103 N.C. App. 479, 405 S.E.2d 794 (1991).

C. Failure to Show Right to Relief.

Defendant's Motion Challenges Sufficiency of Plaintiff's Evidence. —

A defendant in an action being tried without a jury may test the sufficiency of the plaintiff's evidence by moving at the close of plaintiff's evidence for involuntary dismissal under subsection (b) of this rule on the ground that upon the facts and the law the plaintiff has shown no right to relief. *United Carolina Bank*

v. First Union Nat'l Bank, 109 N.C. App. 201, 426 S.E.2d 462 (1993).

Deference to Be Accorded to Court's Judgment. — In the context of an involuntary dismissal, the trial court's findings of fact are conclusive on appeal if supported by competent evidence, even if there is evidence to the contrary. The trial court's judgment must be granted the same deference as a jury verdict. *Carter v. Foster*, 103 N.C. App. 110, 404 S.E.2d 484 (1991).

When Involuntary Dismissal Should Be Granted. —

In accord with the main volume. See *Carter v. Foster*, 103 N.C. App. 110, 404 S.E.2d 484 (1991).

Dismissal Properly Denied. — In an action for breach of express and implied warranties and damages arising out of plaintiffs purchase of an automobile from defendant, it was undisputed that defendant informed plaintiffs of a warranty and that the car suffered from several defects. Plaintiffs attempted to have the car repaired within the warranty period, but to no avail. Based on these facts and other evidence, it would have been improper for the trial court to find that plaintiffs had shown "no right to relief" for their breach of warranty claims; therefore, the trial court properly denied defendant's motion to dismiss. *Riley v. Ken Wilson Ford, Inc.*, 109 N.C. App. 163, 426 S.E.2d 717 (1993).

Remedy Held Unavailable. — In a case not tried by a jury, though the judge's determination that plaintiff was contributorily negligent as a matter of law was error, it was not reversible error. The transcript indicated that the judge made a factual finding from the evidence that plaintiff was contributorily negligent, a finding clearly supported by competent evidence. If the case had been tried to a jury and dismissed before the jury considered it, a new trial would have had to be ordered, but ordering a new trial before a fact-finder who has permissibly found that plaintiff was contributorily negligent and could not prevail in her action would avail her nothing. *Church v. Greene*, 100 N.C. App. 675, 397 S.E.2d 649 (1990).

Rule 42. Consolidation; separate trials.

CASE NOTES

- I. In General.
- III. Separate Trials.

I. IN GENERAL.

Cited in *Crump v. Board of Educ.*, 107 N.C. App. 375, 420 S.E.2d 462 (1992); *Cagle v. Teachy*, 111 N.C. App. 244, 431 S.E.2d 801 (1993).

III. SEPARATE TRIALS.

Separation Held Proper. — Claim against one of several defendants arose from circumstances totally different from those that gave rise to the other claims involved and trying that issue separately was a comparatively simple process that had the advantage of possibly making it unnecessary to try the

other issues; therefore, severance of that claim was proper. *Hoots v. Toms & Bazzle*, 100 N.C. App. 412, 396 S.E.2d 820 (1990).

No Error Where Sound Grounds for Separation Exist. — Since subsection (b) of this rule authorizes the trial judge to order a separate trial of any claim or issue "in furtherance of convenience or to avoid prejudice," the severance of the claim against one of several defendants was within the court's discretion, and was not error since sound grounds therefor existed. *Hoots v. Toms & Bazzle*, 100 N.C. App. 412, 396 S.E.2d 820 (1990).

Rule 43. Evidence.

CASE NOTES

- I. In General.

I. IN GENERAL.

Stated in *Battle v. Nash Technical*

College, 103 N.C. App. 120, 404 S.E.2d 703 (1991).

Rule 44. Proof of official record.

CASE NOTES

Presumption of Validity. — Once a judgment creditor was entitled to a presumption that an out of state judgment was entitled to full faith and credit, the plaintiff was not required to bring forth evidence that none of the defenses available to defendants were valid; rather the defendants were required to bring forth evidence to rebut the presumption of va-

lidity, and, as the defendants offered no such evidence, the trial court correctly ordered that the plaintiff's motion to enforce the judgment be allowed and ordered that the out of state judgment be given full faith and credit. *Lust v. Fountain of Life, Inc.*, 110 N.C. App. 298, 429 S.E.2d 435 (1993).

Rule 46. Objections and exceptions.

CASE NOTES

I. In General.

I. IN GENERAL.

Preserving Matters Underlying a Motion in Limine. — It is not sufficient to simply file a pretrial motion in limine to exclude evidence which the trial judge has not heard; to preserve for appeal matters underlying a motion in limine, the movant must make at least general objection when the evidence is offered at trial. *Beaver v. Hampton*, 106 N.C. App. 172, 416 S.E.2d 8 (1992), rev'd in part and aff'd in part, 333 N.C. 455, 427 S.E.2d 317 (1993).

Failure to Object to Discussion Between Court and Jurors. — Plaintiff who did not object or otherwise voice a concern during a discussion between the court and jurors regarding court's procedure for correcting jury's failure to deliberate on the issues, failed to preserve an exception to that procedure. *Tin Originals, Inc. v. Colonial Tin Works, Inc.*, 98 N.C. App. 663, 391 S.E.2d 831 (1990).

Applied in *Badgett v. Davis*, 104 N.C. App. 760, 411 S.E.2d 200 (1991); *State v. Moore*, 107 N.C. App. 388, 420 S.E.2d 691 (1992).

Rule 49. Verdicts.

CASE NOTES

I. In General.

I. IN GENERAL.

Form and number of issues, etc. —

The form and number of issues to be submitted is a matter which rests in the sound discretion of the trial judge, assuming that the issue is raised by the pleadings, liberally construed. *Lenins v.*

K-Mart Corp., 98 N.C. App. 590, 391 S.E.2d 843 (1990).

Applied in *Stimpson Hosiery Mills, Inc. v. Pam Trading Corp.*, 98 N.C. App. 543, 392 S.E.2d 128 (1990).

Cited in *Cagle v. Teachy*, 111 N.C. App. 244, 431 S.E.2d 801 (1993).

Rule 50. Motion for a directed verdict and for judgment notwithstanding the verdict.

CASE NOTES

I. In General.

II. Directed Verdict.

A. In General.

B. Statement of Specific Grounds.

III. Judgment Notwithstanding the Verdict and New Trial.

I. IN GENERAL.

When Motions Granted. — A defendant is not entitled to a directed verdict or a judgment notwithstanding the verdict unless the evidence, viewed in the light most favorable to the plaintiff, establishes its defense as a matter of law. *Goodwin v. Investors Life Ins. Co. of N.*

Am., 332 N.C. 326, 419 S.E.2d 766 (1992).

Attorneys' Fees. — Section 6-21.5 provides in part that the entry of judgment pursuant to this rule or § 1A-1, Rule 56 may be some evidence that an attorneys' fee may be warranted. The statute's reference to these rules, which are applicable only if evidence in addition to the pleadings is before the court,

thus implies that when deciding whether to grant a motion under § 6-21.5 the trial court may consider evidence developed after the pleadings have been filed. *Sunamerica Fin. Corp. v. Bonham*, 328 N.C. 254, 400 S.E.2d 435 (1991).

Applied in *Hazelwood v. Landmark Bldrs., Inc.*, 100 N.C. App. 386, 396 S.E.2d 342 (1990); *Tin Originals, Inc. v. Colonial Tin Works, Inc.*, 98 N.C. App. 663, 391 S.E.2d 831 (1990); *Hill v. Winn-Dixie Charlotte, Inc.*, 100 N.C. App. 518, 397 S.E.2d 347 (1990); *Abernethy v. Spartan Food Sys.*, 103 N.C. App. 154, 404 S.E.2d 710 (1991); *Boone Lumber, Inc. v. Sigmon*, 103 N.C. App. 798, 407 S.E.2d 291 (1991); *Wilson v. Pearce*, 105 N.C. App. 107, 412 S.E.2d 148 (1992); *Rowan County Bd. of Educ. v. United States Gypsum Co.*, 332 N.C. 1, 418 S.E.2d 648 (1992); *Maintenance Equip. Co. v. Godley Bldrs.*, 107 N.C. App. 343, 420 S.E.2d 199 (1992); *Phillips ex rel. Schultz v. Holland*, 107 N.C. App. 688, 421 S.E.2d 608 (1992); *Mabry v. Nationwide Mut. Fire Ins. Co.*, 108 N.C. App. 37, 422 S.E.2d 322 (1992); *Munie v. Tangle Oaks Corp.*, 109 N.C. App. 336, 427 S.E.2d 149 (1993); *Harrison v. Edison Bros. Apparel Stores*, 814 F. Supp. 457 (M.D.N.C. 1993).

Quoted in *Schwartzback v. Apple Baking Co.*, 109 N.C. App. 216, 426 S.E.2d 438 (1993).

Cited in *Marina Food Assocs. v. Marina Restaurant, Inc.*, 100 N.C. App. 82, 394 S.E.2d 824 (1990); *Parrish Funeral Home v. Pittman*, 104 N.C. App. 268, 409 S.E.2d 327 (1991); *Olvera v. Charles Z. Flack Agency, Inc.*, 106 N.C. App. 193, 415 S.E.2d 760 (1992); *Ace, Inc. v. Maynard*, 108 N.C. App. 241, 423 S.E.2d 504 (1992); *B.B. Walker Co. v. Burns Int'l Sec. Serv., Inc.*, 108 N.C. App. 562, 424 S.E.2d 172 (1993); *McDonald v. Medford*, 111 N.C. App. 643, 433 S.E.2d 231 (1993); *Abels v. Renfro Corp.*, 335 N.C. 209, 436 S.E.2d 822 (1993); *Tate v. Christy*, 114 N.C. App. 45, 440 S.E.2d 858 (1994); *Sheppard v. Zep Mfg. Co.*, 114 N.C. App. 25, 441 S.E.2d 161 (1994).

II. DIRECTED VERDICT.

A. In General.

Plaintiff must make out his case by proving the facts essential to his cause of action or by proving facts permitting an inference of the material facts as a fair and logical conclusion. *Southern Bell Tel. & Tel. Co. v. West*, 100 N.C.

App. 668, 397 S.E.2d 765 (1990), *aff'd*, 328 N.C. 566, 402 S.E.2d 409 (1991).

Degree of Probability Must Exist with Issue of Causation. — Some degree of probability, however small, must exist to provide the jury with a question of causation to resolve, not just mere possibility. *Hinson v. National Starch & Chem. Corp.*, 99 N.C. App. 198, 392 S.E.2d 657 (1990).

As Considered in the Light Most Favorable to Nonmovant.

On a defendant's motion for a directed verdict, plaintiff's evidence must be taken as true and all the evidence must be considered in the light most favorable to the plaintiff, giving him the benefit of every reasonable inference to be drawn therefrom. *Atlantic Tobacco Co. v. Honeycutt*, 101 N.C. App. 160, 398 S.E.2d 641 (1990), discretionary review denied, 328 N.C. 569, 403 S.E.2d 506 (1991).

Contributory Negligence Should Have Been a Jury Question. — Where evidence did not establish plaintiff's contributory negligence as a matter of law, that issue should have been resolved by the jury, and the directed verdict in favor of defendant was reversed. *Crane v. Caldwell*, 113 N.C. App. 362, 438 S.E.2d 449 (1994).

Affirmative Defenses. — Where a defendant establishes an affirmative defense as a matter of law, there are no issues to submit to a jury and a plaintiff has no right to recover. Directing a verdict for the defendant in such instance is appropriate. *Goodwin v. Investors Life Ins. Co. of N. Am.*, 332 N.C. 326, 419 S.E.2d 766 (1992).

It is rarely appropriate to grant a directed verdict for a party bearing the burden of proof. *Looney v. Community Bible Holiness Church*, 103 N.C. App. 469, 405 S.E.2d 811 (1991).

Directed Verdict Not Necessarily Prevented by Prima Facie Case. — Nonmoving party's establishment of a prima facie case did not necessarily prevent the granting of a directed verdict in the moving party's favor. *Goodwin v. Investors Life Ins. Co. of N. Am.*, 332 N.C. 326, 419 S.E.2d 766 (1992).

Directed Verdict Granted Despite Establishment of Prima Facie Case.

— Where insurer showed that the insured made representations which were material and false and, by so doing, fully overcame plaintiff's prima facie case, insurer was entitled to a directed verdict as a matter of law. *Goodwin v. Investors*

Life Ins. Co. of N. Am., 332 N.C. 326, 419 S.E.2d 766 (1992).

Determination of Validity of Will.

— Where appropriate, a trial court may direct a verdict for propounders of a will in a caveat proceeding at the close of all evidence. *In re Will of Jarvis*, 107 N.C. App. 34, 418 S.E.2d 520 (1992), *aff'd* in part, *rev'd* in part, 334 N.C. 140, 430 S.E.2d 922 (1993).

Directed Verdict When, etc. —

A directed verdict on the ground of contributory negligence should be granted only when this defense is so clearly established that no other reasonable inference can be drawn from the evidence. *Williams v. Hall*, 100 N.C. App. 655, 397 S.E.2d 767 (1990).

When a defendant pleads as a defense the plaintiff's contributory negligence, the defendant has the burden of proof on the issue, and if the defendant offers no evidence, a directed verdict for the defendant based on plaintiff's contributory negligence is appropriate only when there are no genuine issues of fact, and the non-movant's contributory negligence is so clearly established that no other reasonable inference or conclusion may be drawn therefrom. *Price v. Jack Eckerd Corp.*, 100 N.C. App. 732, 398 S.E.2d 49 (1990).

Directed verdict on issue of contributory negligence was improper where the plaintiff testified that he was not completely blinded by the oncoming headlights as he approached the tractor-trailer, the plaintiff could see much more than the edge of the road, and the plaintiff may have been keeping a proper lookout without realizing that he was partially blinded only as to the area beyond the tractor-trailer's headlights. In such a deceptive visual situation, the plaintiff may not have been knowingly driving into a blinded area, for it would have appeared as though he could see into the distant darkness. From the evidence there was insufficient evidence to establish that plaintiff was contributorily negligent as a matter of law. *Williams v. Hall*, 100 N.C. App. 655, 397 S.E.2d 767 (1990).

Failure to Show One Cause of Damages More Likely than Others.

— Directed verdict was proper where plaintiff did not offer any testimony suggesting that one cause of his damages was more likely than the others. Such testimony as to causation, being speculative in nature, would have resulted in a verdict founded upon a series of mere

possibilities; and reliance upon a choice of possibilities amounts to nothing more than guesswork. *Southern Bell Tel. & Tel. Co. v. West*, 100 N.C. App. 668, 397 S.E.2d 765 (1990).

Denial of Directed Verdict. — If there is more than a scintilla of evidence supporting each element of the nonmovant's case, the motion for directed verdict should be denied. *Snead v. Holloman*, 101 N.C. App. 462, 400 S.E.2d 91 (1991).

A directed verdict for the defendant is not properly allowed unless it appears as a matter of law that a recovery cannot be had by the plaintiff upon any view of the facts which the evidence reasonably tends to establish; a motion for judgment notwithstanding the verdict is essentially a renewal of a motion for directed verdict and the rules regarding the sufficiency of the evidence to go to the jury are equally applicable. *Kremer v. Food Lion, Inc.*, 102 N.C. App. 291, 401 S.E.2d 837 (1991).

Or His Evidence Is Sufficient to Survive Motion. — Plaintiffs' evidence tending to establish a prescriptive easement was sufficient to survive defendants' motions for directed verdict and for judgment notwithstanding the verdict and the trial court properly dismissed defendants' counterclaim. *Mecimore v. Cothren*, 109 N.C. App. 650, 428 S.E.2d 470, *cert. denied*, 334 N.C. 621, 435 S.E.2d 336 (1993).

Motion for Directed Verdict Properly Granted. — Defendant presented ample evidence of plaintiffs' breach of fiduciary duty; accordingly, the trial court did not err in denying plaintiffs' motion for a directed verdict at the close of defendant's evidence. *Powell v. Omli*, 110 N.C. App. 336, 429 S.E.2d 774 (1993), *cert. denied*, 334 N.C. 621, 435 S.E.2d 338 (1993).

Scope of Review on Appeal. —

Where a party moves for a directed verdict, the trial court must determine whether the evidence, when considered in the light most favorable to the nonmovant, is sufficient to take the case to the jury. Upon appeal, the scope of review is limited to those grounds asserted by the moving party before the trial court. *Southern Bell Tel. & Tel. Co. v. West*, 100 N.C. App. 668, 397 S.E.2d 765 (1990).

B. Statement of Specific Grounds.

Subsection (a) requires that a mo-

tion for directed verdict state specific grounds for the motion; failure to state such grounds is not a basis for an automatic reversal of the directed verdict on appeal. In re Will of Jones, 114 N.C. App. 782, 443 S.E.2d 363 (1994).

III. JUDGMENT NOTWITHSTANDING THE VERDICT AND NEW TRIAL.

Grant of Judgment N.O.V. Erroneous, etc. —

In accord with first paragraph in the main volume. See Kron Medical Corp. v. Collier Cobb & Assocs., 107 N.C. App. 331, 420 S.E.2d 192, cert. denied, 333 N.C. 168, 424 S.E.2d 910 (1992).

Rule 51. Instructions to jury.

CASE NOTES

- I. In General.
- II. Charge to the Jury.
 - A. Generally.
 - B. Decisions under Prior Law.
- IV. Special Instructions.
- V. Opinion of the Judge.

I. IN GENERAL.

Appellate Review of Improper Remark. — Where plaintiff alleges that he has been deprived of right to a fair trial by improper remarks in the hearing of the jury, court will first determine whether the trial judge's remarks, in light of the circumstances under which they were made, were improper and then determine whether such remarks were prejudicial. Ward v. McDonald, 100 N.C. App. 359, 396 S.E.2d 337 (1990).

Remark Regarding Need to Shorten Trial. — Trial judge did not commit prejudicial error in remarking to jury about need to shorten length of trial, which was not a statement of opinion. Ward v. McDonald, 100 N.C. App. 359, 396 S.E.2d 337 (1990).

Applied in Rowan County Bd. of Educ. v. United States Gypsum Co., 103 N.C. App. 288, 407 S.E.2d 860 (1991); Lovell v. Nationwide Mut. Ins. Co., 108 N.C. App. 416, 424 S.E.2d 181 (1993).

Stated in Hassett v. Dixie Furn. Co., 104 N.C. App. 684, 411 S.E.2d 187 (1991).

II. CHARGE TO THE JURY.

A. Generally.

Editor's Note. — The cases under analysis line II, Charge to the Jury, have been reedited and printed in the supplement to distinguish between those cases decided under section (a) of

this rule as it read before and after the amendment in 1985.

The purpose of instructing the jury is to clarify the issues, summarize the relevant evidence, and state the law applicable thereto. McNeill v. Durham County ABC Bd., 87 N.C. App. 50, 359 S.E.2d 500 (1987), rev'd in part on other grounds, 322 N.C. 425, 368 S.E.2d 619, rehearing denied, 322 N.C. 838, 371 S.E.2d 278 (1988).

It is the duty of the trial judge, without any special requests, to instruct the jury on the law as it applies to the substantive features of the case arising on the evidence. Millis Constr. Co. v. Fairfield Sapphire Valley, Inc., 86 N.C. App. 506, 358 S.E.2d 566 (1987).

Instruction as to Every Substantial Feature Required. — Though the trial court is no longer required to explain the application of the law to the evidence, it remains the duty of the court to instruct the jury upon the law with respect to every substantial feature of the case. Mosley & Mosley Bldrs., Inc. v. Landin Ltd., 87 N.C. App. 438, 361 S.E.2d 608 (1987).

Duty of Judge Who Undertakes to Apply Law to Evidence. — Although the trial judge is no longer required to apply the law to the evidence, if the judge undertakes to do so he must instruct completely and without omission. York v. Northern Hosp. Dist., 88 N.C. App. 183, 362 S.E.2d 859 (1987).

Form and Number of Issues Sub-

mitted Are Within Discretion of Judge. — While the judge must submit to the jury such issues raised by the pleadings and evidence as are necessary to fairly adjudicate the controversy at bar, the form and number of the issues submitted is within the sound discretion of the trial judge. *McNeill v. Durham County ABC Bd.*, 87 N.C. App. 50, 359 S.E.2d 500 (1987), rev'd in part on other grounds, 322 N.C. 425, 368 S.E.2d 619, rehearing denied, 322 N.C. 838, 371 S.E.2d 278 (1988).

Failure of the trial court to declare and explain the law with respect to a substantial feature of the case was prejudicial error, entitling defendants to a new trial. *Mosley & Mosley Bldrs., Inc. v. Landin Ltd.*, 87 N.C. App. 438, 361 S.E.2d 608 (1987), appeal dismissed, 322 N.C. 607, 370 S.E.2d 416 (1988).

Peremptory Instruction Properly Denied. — Defendant's evidence regarding the composition of the roadway, the absence of warning signs, the locking of the wheel, the car's tendency to overturn, and evidence that he drove at or below the speed limit, all permitted more than the single inference that defendant was negligent; therefore, trial judge properly refused to give peremptory instruction on negligence. *Hinnant v. Holland*, 92 N.C. App. 142, 374 S.E.2d 152 (1988), cert. denied, 324 N.C. 335, 378 S.E.2d 792 (1989).

In a personal injury action where plaintiff failed to allege permanent injuries in her pleadings and did not amend her complaint to include permanent injuries, the trial court did not err by allowing testimony that plaintiff's injuries were permanent, nor by instructing the jury on the issue of permanency; defendant's objections were all general and failed to avail themselves of the opportunity to demonstrate prejudice or to obtain a continuance as provided by this rule. *Smith v. Buckhram*, 91 N.C. App. 355, 372 S.E.2d 90 (1988), cert. denied, 324 N.C. 113, 377 S.E.2d 236 (1989).

Court improperly instructed the jury on the aggravation of plaintiff's pre-existing condition where the evidence showed no aggravation of a pre-existing condition. *Smith v. Buckhram*, 91 N.C. App. 355, 372 S.E.2d 90 (1988), cert. denied, 324 N.C. 113, 377 S.E.2d 236 (1989).

Denial of Requested Instruction Upheld. — Trial court's denial of plaintiffs' request that the jury be instructed that collision furnished some evidence of

negligence was not an abuse of discretion, since plaintiffs' requested instruction amounted to an application of the law to the evidence, which is not required. *Smith v. Bohlen*, 95 N.C. App. 347, 382 S.E.2d 812 (1989), aff'd sub nom. *State v. Brewer*, 328 N.C. 515, 402 S.E.2d 380 (1991).

Failure to Submit Instruction Improper. — The trial court erred by failing to submit an instruction on the issue of last clear chance. *Hurley v. Miller*, 113 N.C. App. 658, 440 S.E.2d 286 (1994).

B. Decisions under Prior Law.

Editor's Note. — *The cases cited below were decided prior to the 1985 amendment rewriting section (a) of this rule, which formerly provided that the judge should declare and explain the law arising on the evidence, but give no opinion on whether a fact had been proved.*

Requirement of Former § 1-180 Continued by This Rule. — The requirement of this rule that the judge "shall declare and explain the law arising on the evidence given in the case" is a continuation of the requirement contained in former § 1-180. *Terry v. Jim Walter Corp.*, 8 N.C. App. 637, 175 S.E.2d 354 (1970).

Civil cases are governed by section (a) of this rule, which incorporates the substance of former § 1-180. *Atkins v. Moye*, 277 N.C. 179, 176 S.E.2d 789 (1970).

The provisions of section (a) are identical to those of former § 1-180, which formerly governed the trial of civil cases as well as criminal cases. *Little v. Poole*, 11 N.C. App. 597, 182 S.E.2d 206 (1971).

Former § 1-180 is now embodied in substance within section (a) of this rule. *Heath v. Swift Wings, Inc.*, 40 N.C. App. 158, 252 S.E.2d 526, cert. denied, 297 N.C. 453, 256 S.E.2d 806 (1979).

Although the provisions of § 1-180 have been repealed and are now embodied in subsection (a) of this rule, the law remains, for all practical purposes, unchanged. *Consolidated Sys. v. Granville Steel Corp.*, 63 N.C. App. 485, 305 S.E.2d 57 (1983).

This rule confers a substantial legal right, and imposes upon the trial judge a positive duty, so that his failure to charge on the substantial features of the case arising on the evidence is prejudicial error, even without a prayer for

special instruction. *Clay v. Garner*, 16 N.C. App. 510, 192 S.E.2d 672 (1972).

Not Dependent on Request for Special Instructions. — This rule confers a substantial legal right, not dependent on a request for special instructions, and failure to charge on the material features of a case is prejudicial error. *Horne v. Wall*, 27 N.C. App. 373, 219 S.E.2d 288 (1975), cert. denied, 289 N.C. 297, 222 S.E.2d 697 (1976).

The trial court has a duty, without a request for special instruction, to explain the law and apply it to the evidence on all substantial features of the case. The failure to do so constitutes prejudicial error and entitles the aggrieved party to a new trial. *Stiles v. Charles M. Morgan Co.*, 64 N.C. App. 328, 307 S.E.2d 409 (1983).

This rule requires the trial judge to perform two positive acts: (1) To declare and explain the law arising on the evidence presented in the case; and (2) to review such evidence to the extent necessary to explain the application of that law to the particular facts and circumstances of the case. *Bodenheimer v. Bodenheimer*, 17 N.C. App. 434, 194 S.E.2d 375, cert. denied, 283 N.C. 392, 196 S.E.2d 274 (1973); *Horne v. Wall*, 27 N.C. App. 373, 219 S.E.2d 288 (1975), cert. denied, 289 N.C. 297, 222 S.E.2d 697 (1976); *Brown v. Scism*, 50 N.C. App. 619, 274 S.E.2d 897, cert. denied, 302 N.C. 396, 276 S.E.2d 919 (1981).

The chief purpose of a charge is to aid the jury to clearly understand the case and arrive at a correct verdict. *Turner v. Turner*, 9 N.C. App. 336, 176 S.E.2d 24 (1970); *Warren v. Parks*, 31 N.C. App. 609, 230 S.E.2d 684 (1976), cert. denied, 292 N.C. 269, 233 S.E.2d 396 (1977); *Burns v. McElroy*, 57 N.C. App. 299, 291 S.E.2d 278 (1982).

And to Eliminate Irrelevant Matters. — The purpose of the court's charge is to eliminate irrelevant matters so that the jury may understand and appreciate the facts which determine the case. *Brown v. Scism*, 50 N.C. App. 619, 274 S.E.2d 897, cert. denied, 302 N.C. 396, 276 S.E.2d 919 (1981).

In applying the law to the evidence the jury must be given guidance as to what facts, if found by them to be true, would justify them in answering the issues submitted to them in the affirmative or the negative. *Broadnax v. Deloatch*, 20 N.C. App. 430, 201 S.E.2d 525, cert. denied, 285 N.C. 85, 203 S.E.2d 57 (1974).

Where the jury is given no guidance as to what facts, if found by them to be true, would justify them in answering the sole issue submitted to them either in the affirmative or the negative, the trial judge has failed to comply with the mandate of section (a) of this rule. *American Credit Co. v. Brown*, 10 N.C. App. 382, 178 S.E.2d 649 (1971).

Judge Must Declare and Explain the Law Arising on the Evidence. — It is incumbent upon the judge to declare and explain the law arising on the evidence as to all substantial features of the case, without any special prayer for instructions to that effect. *Terry v. Jim Walter Corp.*, 8 N.C. App. 637, 175 S.E.2d 354 (1970); *Link v. Link*, 9 N.C. App. 135, 175 S.E.2d 735 (1970), rev'd on other grounds, 278 N.C. 181, 179 S.E.2d 697 (1971); *Investment Properties of Asheville, Inc. v. Norburn*, 281 N.C. 191, 188 S.E.2d 342 (1972); *Warren v. Parks*, 31 N.C. App. 609, 230 S.E.2d 684 (1976), cert. denied, 292 N.C. 269, 233 S.E.2d 396 (1977); *Penley v. Penley*, 314 N.C. 1, 332 S.E.2d 51 (1985).

The duty of the judge is to declare the law arising on the evidence and to explain the application of the law thereto. *Link v. Link*, 278 N.C. 181, 179 S.E.2d 697 (1971).

In charging the jury in any civil action, the judge shall declare and explain the law arising on the evidence given in the case. *Watson v. White*, 60 N.C. App. 106, 298 S.E.2d 174 (1982), rev'd on other grounds, 309 N.C. 498, 308 S.E.2d 268 (1983).

The provisions of this rule require that the trial judge in his charge to the jury shall declare and explain the law arising on the evidence in the case, and unless this mandatory provision of the statute is observed, there can be no assurance that the verdict represents a finding by the jury under the law and on the evidence presented. *Redding v. F.W. Woolworth Co.*, 14 N.C. App. 12, 187 S.E.2d 445 (1972).

It is the duty of the court to charge the law applicable to the substantive features of the case arising on the evidence, without special request, and to apply the law to the various factual situations presented by the conflicting evidence. *Panhorst v. Panhorst*, 277 N.C. 664, 178 S.E.2d 387 (1971); *Investment Properties of Asheville, Inc. v. Norburn*, 281 N.C. 191, 188 S.E.2d 342 (1972); *Howell v. Howell*, 24 N.C. App. 127, 210 S.E.2d 216 (1974); *Martin v. Amusements of*

Am., Inc., 38 N.C. App. 130, 247 S.E.2d 639, cert. denied, 296 N.C. 106, 249 S.E.2d 804 (1978); *Harris v. Bridges*, 59 N.C. App. 195, 296 S.E.2d 299 (1982).

In every case the court has the duty to instruct the jury correctly on all substantive features of the case. *Duke v. Mutual Life Ins. Co.*, 22 N.C. App. 392, 206 S.E.2d 796, rev'd on other grounds, 286 N.C. 244, 210 S.E.2d 187 (1974).

The law must be declared, explained and applied to the evidence bearing on the substantial and essential features of a case. *Coble v. Martin Fireproofing Ga., Inc.*, 25 N.C. App. 671, 214 S.E.2d 239 (1975).

When charging the jury in a civil case it is the duty of the trial court to explain the law and to apply it to the evidence on the substantial issues of the action. *Cockrell v. Cromartie Transp. Co.*, 295 N.C. 444, 245 S.E.2d 497 (1978).

This rule imposes upon the trial judge a duty to explain the law and to apply it to the evidence on all substantial features of the case. *Federated Mut. Ins. Co. v. Hardin*, 67 N.C. App. 487, 313 S.E.2d 801 (1984); *Penley v. Penley*, 314 N.C. 1, 332 S.E.2d 51 (1985).

This rule imposes a positive duty on the trial judge to charge on the substantial features of the case as the evidence dictates. *Hord v. Atkinson*, 68 N.C. App. 346, 315 S.E.2d 339 (1984).

The trial court has a duty to explain the law and apply it to the evidence on all substantial features of the case. Failure to do so constitutes prejudicial error and entitles the aggrieved party to a new trial. *Scher v. Antonucci*, 77 N.C. App. 810, 336 S.E.2d 434 (1985).

The trial court has wide discretion in presenting the issues to the jury, and no abuse of discretion will be found where the issues are sufficiently comprehensive to resolve all factual controversies and to enable the court to render judgment fully determining the cause. *Murrow v. Daniels*, 321 N.C. 494, 364 S.E.2d 392 (1988), decided under rule as it read prior to amendment.

A mere declaration of the law in general terms and a statement of the contentions of the parties is insufficient. *Terry v. Jim Walter Corp.*, 8 N.C. App. 637, 175 S.E.2d 354 (1970); *Link v. Link*, 9 N.C. App. 135, 175 S.E.2d 735 (1970), rev'd on other grounds, 278 N.C. 181, 179 S.E.2d 697 (1971); *Jones v. Bess*, 26 N.C. App. 1, 214 S.E.2d 599 (1975).

This rule imposes upon the trial judge

the positive duty of declaring and explaining the law arising on the evidence as to all the substantial features of the case; a mere declaration of the law in general terms and a statement of the contentions of the parties is not sufficient to satisfy the requirements of this rule. *Redding v. F.W. Woolworth Co.*, 14 N.C. App. 12, 187 S.E.2d 445 (1972); *Hunt v. Montgomery Ward & Co.*, 49 N.C. App. 642, 272 S.E.2d 357 (1980).

Charge given by trial court that merely recapitulated the evidence, stated the parties' contentions and recited certain general principles of contract law would not suffice. *Coble v. Martin Fireproofing Ga., Inc.*, 25 N.C. App. 671, 214 S.E.2d 239 (1975).

As Is a Charge Which Fails to Apply the Law to the Evidence. — A charge which contains a general explanation of the law but fails to apply the law to the evidence given in the case then being tried is insufficient. *Campbell v. Campbell*, 18 N.C. App. 665, 197 S.E.2d 804 (1973).

Judge's duty is not to charge the jury by implication, but to declare and explain the law arising on the evidence given in the case. *Harris v. Bridges*, 59 N.C. App. 195, 296 S.E.2d 299 (1982).

What Issues to Be Submitted to Jury. — The judge must submit to the jury such issues as when answered by them will resolve all material controversies between the parties, as raised by the pleadings. *Harrison v. McLearn*, 49 N.C. App. 121, 270 S.E.2d 577 (1980); *Davis v. Davis*, 58 N.C. App. 25, 293 S.E.2d 268, cert. denied, 307 N.C. 127, 297 S.E.2d 399 (1982).

The judge must bring into view the relations of the particular evidence adduced to the particular issues involved. This is what is meant by the expression that the judge must apply the facts to the law for the enlightenment of the jury. *Link v. Link*, 9 N.C. App. 135, 175 S.E.2d 735 (1970), rev'd on other grounds, 278 N.C. 181, 179 S.E.2d 697 (1971).

Section (a) of this rule requires the judge to explain the law of the case, to point out the essentials to be proved on the one side or the other, and to bring into view the relations of the particular evidence adduced to the particular issues involved. *Panhorst v. Panhorst*, 277 N.C. 664, 178 S.E.2d 387 (1971); *Redding v. F.W. Woolworth Co.*, 14 N.C. App. 12, 187 S.E.2d 445 (1972); *Howell*

v. Howell, 24 N.C. App. 127, 210 S.E.2d 216 (1974).

In order for the trial court to discharge its duty under this rule, the court must give the jury a clear mandate as to what facts, for which there was support in the evidence, it would have to find in order to answer the issue either in the affirmative or in the negative. *Deep Run Milling Co. v. Williams*, 60 N.C. App. 160, 298 S.E.2d 205 (1982).

The trial judge must explain and apply the law to the specific facts pertinent to the issue involved. *Harrison v. McLearn*, 49 N.C. App. 121, 270 S.E.2d 577 (1980); *Davis v. Davis*, 58 N.C. App. 25, 293 S.E.2d 268, cert. denied, 307 N.C. 127, 297 S.E.2d 399 (1982).

And Relate the Law to the Variant Factual Situations Presented. — When charging the jury in a civil action the trial judge shall declare and explain the law arising on the evidence. He must relate and apply the law to the variant factual situations presented by some reasonable view of the evidence. *Superior Foods, Inc. v. Harris-Teeter Super Mkts., Inc.*, 288 N.C. 213, 217 S.E.2d 566 (1975).

The trial judge is not required to review all of the evidence. *Maynard v. Pigford*, 17 N.C. App. 129, 193 S.E.2d 293 (1972).

But he must summarize it sufficiently to permit him to explain the application of the law thereto. *Maynard v. Pigford*, 17 N.C. App. 129, 193 S.E.2d 293 (1972).

The judge is not required to state the evidence except to the extent necessary to explain how the law applies to the evidence presented in the case being tried. *Redding v. F.W. Woolworth Co.*, 14 N.C. App. 12, 187 S.E.2d 445 (1972).

Summary of the material aspects of the evidence sufficient to bring into focus controlling legal principles is all that is required with respect to stating the evidence. *Clay v. Garner*, 16 N.C. App. 510, 192 S.E.2d 672 (1972).

The judge is not required to declare and explain the law on a set of hypothetical facts. *Terrell v. H. & N. Chevrolet Co.*, 11 N.C. App. 310, 181 S.E.2d 124 (1971).

Trial court is not required to read technical statutory language to the jury. *Tuttle v. Tuttle*, 38 N.C. App. 651, 248 S.E.2d 896 (1978), cert. denied, 296 N.C. 589, 254 S.E.2d 32 (1979).

Fact that some language of the complaint was used in declaring the

law of the case is not error so long as the judge explains all the law arising from the evidence. *Broadnax v. Deloatch*, 20 N.C. App. 430, 201 S.E.2d 525, cert. denied, 285 N.C. 85, 203 S.E.2d 57 (1974).

Where the trial court adequately instructs the jury as to the law on every material aspect of the case arising from the evidence and applies the law fairly to variant factual situations presented by the evidence, the charge is sufficient. *Murrow v. Daniels*, 321 N.C. 494, 364 S.E.2d 392 (1988), decided under rule as it read prior to amendment.

It is error for the trial court to charge the jury upon an abstract principle of law which is not presented by the allegations and evidence. *Huggins v. Kye*, 10 N.C. App. 221, 178 S.E.2d 127 (1970).

Instructions on elements of damages are not proper if the evidence does not reveal a basis for such an award. *Spears v. Service Distrib. Co.*, 27 N.C. App. 646, 219 S.E.2d 817 (1975).

Failure to explain the law and apply it to the evidence on all substantial features of the case constitutes prejudicial error for which the aggrieved party is entitled to a new trial. *Investment Properties of Asheville, Inc. v. Norburn*, 281 N.C. 191, 188 S.E.2d 342 (1972); *Clifford v. River Bend Plantation, Inc.*, 55 N.C. App. 514, 286 S.E.2d 352 (1982).

Where the jury was left to determine for itself, without adequate explanation from the court, what law arose on the evidence in the case and how that law should be applied to the evidence, defendant was entitled to a new trial. *Turner v. Turner*, 9 N.C. App. 336, 176 S.E.2d 24 (1970).

Although defendant's trial counsel made no objection to the form of the issues which were submitted to the jury, defendant was entitled to have the issues decided by the jury under a charge from the court which correctly declared and explained the law arising on the evidence, and for errors in the charge there must be a new trial. *Price v. Conley*, 12 N.C. App. 636, 184 S.E.2d 405 (1971).

The trial judge's failure to charge the law on the substantial features of the case arising on the evidence is prejudicial error. *Turner v. Turner*, 9 N.C. App. 336, 176 S.E.2d 24 (1970); *Price v. Conley*, 12 N.C. App. 636, 184 S.E.2d

405 (1971); *Clay v. Garner*, 16 N.C. App. 510, 192 S.E.2d 672 (1972).

As Does Failure to Explain the Law as Applied to Evidence Susceptible of Several Interpretations. —

When the evidence is susceptible of several interpretations, a failure to give instructions which declare and explain the law in its application to the several phases of the evidence is held for reversible error. *Superior Foods, Inc. v. Harris-Teeter Super Mkts., Inc.*, 288 N.C. 213, 217 S.E.2d 566 (1975); *Williamson v. Vann*, 42 N.C. App. 569, 257 S.E.2d 102 (1979).

The jury charge must be considered contextually as a whole, and when so considered, if it presents the law of the case in such manner as to leave no reasonable cause to believe the jury was misled or misinformed, an exception that the instruction might have been better stated will not be sustained. *Jones v. Satterfield Dev. Co.*, 16 N.C. App. 80, 191 S.E.2d 435, cert. denied, 282 N.C. 304, 192 S.E.2d 194 (1972); *Hanks v. Nationwide Mut. Fire Ins. Co.*, 47 N.C. App. 393, 267 S.E.2d 409 (1980).

In reviewing the charge of a trial court, the Court of Appeals must read and consider the charge as a whole. When a charge presents the law fairly and clearly to the jury, it will afford no ground for reversing the judgment, though some of the expressions, when standing alone, might be regarded as erroneous. *State v. Wade*, 49 N.C. App. 257, 271 S.E.2d 77 (1980), cert. denied, 315 N.C. 596, 341 S.E.2d 37 (1986).

But erroneous instructions on the burden of proof are not cured by contextual construction. *Starkey Paint Co. v. Springfield Life Ins. Co.*, 24 N.C. App. 507, 211 S.E.2d 498 (1975).

Conflicting instructions on a material aspect of the case must be held prejudicial error, since it cannot be determined that the jury was not influenced by the incorrect portion of the charge. *Cross v. Beckwith*, 16 N.C. App. 361, 192 S.E.2d 64 (1972), rev'd on other grounds, 293 N.C. 224, 238 S.E.2d 130 (1977).

Conflicting instructions on the applicable law or on a substantive feature of the case, particularly on the burden of proof, entitle defendant to a new trial, since it must be assumed on appeal that the jury was influenced in coming to a verdict by that portion of the charge which was erroneous. *State v. Jones*, 20 N.C. App. 454, 201 S.E.2d 552 (1974).

When there are conflicting instructions to the jury upon a material point, the one correct and the other incorrect, a new trial must be granted because it will not be assumed that the jurors possessed such discriminating knowledge of the law as would enable them to disregard the erroneous and to accept the correct statement of the law as their guide. *Starkey Paint Co. v. Springfield Life Ins. Co.*, 24 N.C. App. 507, 211 S.E.2d 498 (1975).

An instruction relating to a factual situation not properly supported by the evidence is erroneous. *Superior Foods, Inc. v. Harris-Teeter Super Mkts., Inc.*, 288 N.C. 213, 217 S.E.2d 566 (1975).

Where the instructions of the court are based upon an assumption of facts which are not in evidence, they must be held for error. *Clark v. Barber*, 20 N.C. App. 603, 202 S.E.2d 347 (1974).

No Error in Failure to Instruct as to Contention Not Supported by Evidence. — There being no evidence to support a finding of ratification, there was no error prejudicial to the defendant in the failure of the trial court to instruct the jury as to the defendant's contention with respect thereto. *Link v. Link*, 278 N.C. 181, 179 S.E.2d 697 (1971).

While it is the general rule that in a civil case the trial judge must declare and explain the law arising in the evidence, even in the absence of a special request such rule has certain accepted limits. The instruction must be based on evidence which, when viewed in the light most favorable to the proponent, will support a reasonable inference of each essential element of the claim or defense asserted. *In re Will of Cooley*, 66 N.C. App. 411, 311 S.E.2d 613 (1984).

Submission of Defense. — When a party contends that certain acts constitute a defense, the trial court must submit the issue to the jury with appropriate instructions if there is evidence which, when viewed in the light most favorable to the proponent, will support a reasonable inference of each essential element of the defense asserted. *Plymouth Pallet Co. v. Wood*, 51 N.C. App. 702, 277 S.E.2d 462, cert. denied, 303 N.C. 545, 281 S.E.2d 393 (1981).

Specific Acts or Omissions Which Could Constitute Negligence or Contributory Negligence Must Be Stated. — Under this section the trial court must relate to the jury the specific acts

or omissions which, under the pleadings and evidence, could constitute negligence or contributory negligence. *Everhart v. LeBrun*, 52 N.C. App. 139, 277 S.E.2d 816 (1981); *Zach v. Surry-Yadkin Elec. Membership Corp.*, 57 N.C. App. 326, 291 S.E.2d 290 (1982).

In a personal injury action arising out of a collision, it is error for the court to fail to instruct the jury as to what effect a finding of plaintiff's intoxication at the time of the collision would have upon the issue of plaintiff's contributory negligence. *Atkins v. Moye*, 277 N.C. 179, 176 S.E.2d 789 (1970).

Where the judge failed to explain to the jury what bearing their findings as to the facts would have on the issue of defendant's negligence and the instructions gave the jury unlimited authority to find the defendant generally negligent for any reason the evidence might suggest to them, there was error. *Redding v. F.W. Woolworth Co.*, 14 N.C. App. 12, 187 S.E.2d 445 (1972).

Where trial judge defined burden of proof, negligence, and proximate cause in general terms and then recapitulated the evidence and the contentions of the parties, and instructed as to the measure of damages, but failed to instruct the jury as to what facts if found by them to be true would constitute negligence, there was reversible error. *Brady v. Smith*, 18 N.C. App. 293, 196 S.E.2d 580 (1973).

Where the instructions to the jury on the issue of defendant's negligence consisted merely of a brief summary of the evidence, a statement of the issue, a statement on the burden of proof, and general definitions of negligence and proximate cause, and where the trial court failed to relate the principles of law set forth in its instructions to the evidence in this personal injury action, failed to specify the duties owed by defendant to plaintiff's decedent and the acts or omissions by defendant established by the evidence from which the jury could find a breach of those duties, and failed to relate the contentions of negligence supported by the evidence, such failure was inherently prejudicial under section (a) of this rule. *Hunt v. Montgomery Ward & Co.*, 49 N.C. App. 642, 272 S.E.2d 357 (1980).

Where the court reviewed in detail evidence of plaintiff's injuries, the failure of the court to repeat such evidence in enunciating the rule for the measurement of damages for personal

injury was not error. *Love v. Hunt*, 17 N.C. App. 673, 195 S.E.2d 135 (1973).

By alleging the existence of a pertinent city ordinance, introducing it in evidence and presenting testimony tending to show its violation by defendants, plaintiffs made the ordinance a substantial feature of the case, thereby imposing on the trial judge a positive duty to give appropriate jury instructions with respect to the ordinance. *Pharo v. Pearson*, 28 N.C. App. 171, 220 S.E.2d 359 (1975).

Where the question of whether time was of the essence was a substantial feature of a case, the trial judge was required, without a request, to declare and explain the law with respect thereto. *Gelder & Assocs. v. Continental Ins. Co.*, 15 N.C. App. 686, 190 S.E.2d 674 (1972).

Paraphrase of Law in Condemnation Action Held Insufficient. — Where, in a highway condemnation action, plaintiff's witness, an expert real estate appraiser, testified that the value of defendant's land was increased by the taking because a roadway fronting the property was paved, a paraphrase of the law of benefits contained in the trial court's statement to the jury of the plaintiff's contentions was not adequate to satisfy the mandate of section (a) of this rule. *North Carolina Bd. of Transp. v. Rand*, 299 N.C. 476, 263 S.E.2d 565 (1980).

Trial judge properly refused to submit instruction on "proper control" of automobile. See *Dunn v. Herring*, 75 N.C. App. 308, 330 S.E.2d 834, cert. denied, 314 N.C. 538, 335 S.E.2d 16 (1985).

Instruction for following too closely. — Where violation of § 20-152(a) bore directly on the issue of defendant's negligence, which was a substantial feature of the case, the court should have declared and explained the section in its charge to the jury, and should also have explained that violation of this section was negligence per se. It has this duty irrespective of plaintiff's request for special instructions. *Scher v. Antonucci*, 77 N.C. App. 810, 336 S.E.2d 434 (1985).

The credibility of the witnesses and conflicts in the evidence are for the jury, not the court. *Atkins v. Moye*, 277 N.C. 179, 176 S.E.2d 789 (1970); *Cutts v. Casey*, 278 N.C. 390, 180 S.E.2d 297 (1971).

Preemptory Instructions Not Abol-

ished. — The new Rules of Civil Procedure have not abolished peremptory instructions in proper cases. *Terrell v. H. & N. Chevrolet Co.*, 11 N.C. App. 310, 181 S.E.2d 124 (1971).

Peremptory instruction does not deprive the jury of right to reject evidence because of lack of credibility. *Terrell v. H. & N. Chevrolet Co.*, 11 N.C. App. 310, 181 S.E.2d 124 (1971).

When Peremptory Instruction May Be Given. — When all the evidence offered suffices, if true, to establish the controverted fact, the court may give a peremptory instruction to the effect that if the jury finds the facts to be as all the evidence tends to show, it will answer the inquiry in an indicated manner. Defendant's denial of an alleged fact raises an issue as to its existence even though he offers no evidence tending to contradict that offered by plaintiff. *Terrell v. H. & N. Chevrolet Co.*, 11 N.C. App. 310, 181 S.E.2d 124 (1971).

The correct form of a peremptory instruction is that the jury should answer the issue as specified if the jury should find from the greater weight of the evidence that the facts are as all the evidence tends to show. The court should also charge that if the jury does not so find they should answer the issue in the opposite manner. In other words, the court must leave it to the jury to decide the issue. *Terrell v. H. & N. Chevrolet Co.*, 11 N.C. App. 310, 181 S.E.2d 124 (1971).

Duty of Counsel to Point Out Misstatement of the Evidence. — When the court's statement of the evidence in condensed form does not correctly reflect the testimony of the witnesses in any particular respect, it is the duty of counsel to call attention thereto and request a correction. *Clay v. Garner*, 16 N.C. App. 510, 192 S.E.2d 672 (1972).

When Inadvertent Misstatement of Evidence Is Reversible Error. — An inadvertence by the court in recapitulating the evidence will not be grounds for reversible error unless it is called to the

attention of the court in time for correction. *Sims v. Virginia Homes Mfg. Corp.*, 32 N.C. App. 193, 231 S.E.2d 287 (1977).

A broadside assignment of error to the charge as a whole is ineffective to bring up any portion of the charge for review. *Investment Properties of Asheville, Inc. v. Allen*, 281 N.C. 174, 188 S.E.2d 441 (1972), vacated on other grounds, 283 N.C. 277, 196 S.E.2d 262 (1973).

Reversal Where Instruction Is Patently Erroneous. — Although where there is no evidence in the record on appeal the trial court's charge will be sustained, it is also true that where an instruction is patently or inherently erroneous to the prejudice of the appellant, the judgment will be reversed for new trial. *Bodenheimer v. Bodenheimer*, 17 N.C. App. 434, 194 S.E.2d 375, cert. denied, 283 N.C. 392, 196 S.E.2d 274 (1973).

IV. SPECIAL INSTRUCTIONS.

Failure to Give Proper Specific Instruction, etc. —

In accord with the main volume. See *Stimpson Hosiery Mills, Inc. v. Pam Trading Corp.*, 98 N.C. App. 543, 392 S.E.2d 128 (1990).

V. OPINION OF THE JUDGE.

Court's Daily Prayer. — Absent a showing of prejudice by appellants, it could not be concluded that the trial court's daily prayer amounted to an impermissible expression of opinion in violation of subsection (a) of this Rule. *Hill v. Cox*, 108 N.C. App. 454, 424 S.E.2d 201 (1993).

Informal Remarks Held Not Reversible Error. — Judge's remarks to jury on the opening of court for the second and third days of trial, to the effect that jurors should "sit back, relax and stay tuned for the next portion of the trial," may have been informal and even jocular but did not constitute reversible error. *Lenins v. K-Mart Corp.*, 98 N.C. App. 590, 391 S.E.2d 843 (1990).

Rule 52. Findings by the court.

CASE NOTES

- I. In General.
- II. Findings and Conclusions, Generally.
- III. Findings and Conclusions on Grant or Denial of Motions, Preliminary Injunctions, etc.

I. IN GENERAL.

This rule necessarily contemplates that facts be found before conclusions can be reached. *Baker v. Baker*, 102 N.C. App. 792, 404 S.E.2d 20 (1991).

Where an order's rationale is tainted by a process that violates this rule, a new trial of the issues is required. *Baker v. Baker*, 102 N.C. App. 792, 404 S.E.2d 20 (1991).

Issues Must Be Resolved by Trial Court Before Appellate Review. — In a trial without a jury, it is the duty of the trial judge to resolve all issues raised by the pleadings and the evidence by making findings of fact and drawing therefrom conclusions of law upon which to base a final order or judgment. When all issues are not so resolved by the trial court, an appellate court has no option other than to vacate the order and remand the cause to the trial court for completion. *Small v. Small*, 107 N.C. App. 474, 420 S.E.2d 678 (1992).

Requirement of Appropriately Detailed Findings. — The requirement of appropriately detailed findings is designed to dispose of the issues raised by the pleadings and to allow the appellate courts to perform their proper function in the judicial system. *Mashburn v. First Investors Corp.*, 102 N.C. App. 560, 402 S.E.2d 860 (1991).

Under this rule, the facts required to be found specially are those material and ultimate facts from which it can be determined whether the findings are supported by the evidence and whether they support the conclusions of law reached. *Guilford County Planning & Dev. Dep't v. Simmons*, 102 N.C. App. 325, 401 S.E.2d 659, cert. denied, 329 N.C. 496, 407 S.E.2d 533 (1991).

Rescission Offer. — Judgment that simply made the bare conclusion that an investment firm tendered a "valid" rescission offer and that, therefore, the investor was barred from bringing suit under the provisions of subdivision (g)(1) of § 78A-56 did not rise to the level of separate findings of fact and conclusions of

law; the judgment, therefore, did not comport with the requirements of § 1A-1, Rule 41(b) and subsection (a) of this rule. *Mashburn v. First Investors Corp.*, 102 N.C. App. 560, 402 S.E.2d 860 (1991).

Applied in *Patrick v. Ronald Williams, Professional Ass'n*, 102 N.C. App. 355, 402 S.E.2d 452 (1991); *Mashburn v. First Investors Corp.*, 111 N.C. App. 398, 432 S.E.2d 869 (1993).

Quoted in *Kirby Bldg. Sys. v. McNiel*, 327 N.C. 234, 393 S.E.2d 827 (1990); *Provident Finance Co. v. Rowe*, 101 N.C. App. 367, 399 S.E.2d 368 (1991); *Institution Food House, Inc. v. Circus Hall of Cream, Inc.*, 107 N.C. App. 552, 421 S.E.2d 370 (1992).

Stated in *Statesville Stained Glass, Inc. v. T.E. Lane Constr. & Supply Co.*, 110 N.C. App. 592, 430 S.E.2d 437 (1993).

Cited in *Blalock Elec. Co. v. Grassy Creek Dev. Corp.*, 99 N.C. App. 440, 393 S.E.2d 354 (1990); *Tay v. Flaherty*, 100 N.C. App. 51, 394 S.E.2d 217 (1990); *Oglesby v. S.E. Nichols, Inc.*, 101 N.C. App. 676, 401 S.E.2d 92 (1991); *Grant v. Cox*, 106 N.C. App. 122, 415 S.E.2d 378 (1992); *Thacker v. Thacker*, 107 N.C. App. 479, 420 S.E.2d 479 (1992); *Lowry v. Duke Univ. Medical Ctr.*, 109 N.C. App. 83, 425 S.E.2d 739 (1993).

II. FINDINGS AND CONCLUSIONS, GENERALLY.

Timeliness of Request. — A request for findings and conclusions under subsection (a)(2) of this rule is untimely if made after the entry of a trial court's order. *Nobles v. First Carolina Communications, Inc.*, 108 N.C. App. 127, 423 S.E.2d 312 (1992), cert. denied, 333 N.C. 463, 427 S.E.2d 623 (1993).

Under § 1A-1, Rule 60(b), the trial court is not required to make findings of fact unless requested to do so by a party. *Nations v. Nations*, 111 N.C. App. 211, 431 S.E.2d 852 (1993).

The findings recited by the Disciplinary Committee in its order were inadequate to support its conclusion

that the defendant's letter was threatening, because the Committee made no findings as to the exact nature of that threat nor as to the specific relationship between the defendant's "threatening letter" and the administration of justice. Thus the Committee's findings failed to conform to subdivision (a)(1) of this rule. *North Carolina State Bar v. Beaman*, 100 N.C. App. 677, 398 S.E.2d 68 (1990).

Deletion of Finding Without Reconsidering Conclusion Prejudicial to Defendant. — Where a judge initially found that defendant had committed adultery and then deleted that finding without reconsidering his conclusions, including the conclusion that plaintiff was entitled to permanent alimony, that process violated the sequence required by this rule to the prejudice of

the defendant. *Baker v. Baker*, 102 N.C. App. 792, 404 S.E.2d 20 (1991).

III. FINDINGS AND CONCLUSIONS ON GRANT OR DENIAL OF MOTIONS, PRELIMINARY INJUNCTIONS, ETC.

Findings and Conclusions Generally Not Required on Motions Absent Request. —

Where no request was made that the trial judge make findings to support the denial of its motion, it was presumed that the judge made the determination based upon proper evidence. *House Healers Restorations, Inc. v. Ball*, 112 N.C. App. 783, 437 S.E.2d 383 (1993).

Rule 53. Referees.

CASE NOTES

I. In General.

I. IN GENERAL.

Cited in *Brown v. Brown*, 112 N.C. App. 15, 434 S.E.2d 873 (1993).

ARTICLE 7.

Judgment.

Rule 54. Judgments.

CASE NOTES

I. In General.

II. Judgment on Multiple Claims or Involving Multiple Parties.

I. IN GENERAL.

A trial court cannot confer appeal status under subsection (b) by designating its decision a "final judgment" if its ruling is not indeed such a judgment; the trial court's order denying insurance company's motion for summary judgment did not constitute a "final" judgment and was therefore not appealable. *Cagle v. Teachy*, 111 N.C. App. 244, 431 S.E.2d 801 (1993).

Finality. — This rule indicates that finality with respect to parties and claims is a key aspect of a judgment as it

relates to its entry and appealability. *Stachlowski v. Stach*, 328 N.C. 276, 401 S.E.2d 638 (1991).

The importance of finality to the timing of entry of judgment is apparent more from the interrelationship between this rule and § 1A-1, Rule 58 than from the express language of Rule 58 itself. The principal concern regarding finality is that all matters for determination be resolved. *Stachlowski v. Stach*, 328 N.C. 276, 401 S.E.2d 638 (1991).

Requirements of Rule. — This rule imposes three requirements on the court sitting as finder of fact: it must (1) find

the facts on all issues joining the pleadings; (2) declare the conclusions of law arising from the facts found; and (3) enter judgment accordingly. *Stachlowski v. Stach*, 328 N.C. 276, 401 S.E.2d 638 (1991).

Interlocutory Order Defined. —

Order requiring party to take actions “pending further orders of this court,” was an interlocutory order, since it was made during the pendency of the action and did not dispose of the case in a final manner. *Transtector Sys. v. Electric Supply, Inc.*, 113 N.C. App. 148, 437 S.E.2d 699 (1993).

When Summary Judgment is Immediately Appealable. — Where dismissal of an appeal of a summary judgment could result in two different trials on the same issues, thereby creating the possibility of inconsistent verdicts, a substantial right is prejudiced and the summary judgment is immediately appealable. *Taylor v. Brinkman*, 108 N.C. App. 767, 425 S.E.2d 429, cert. denied, 333 N.C. 795, 431 S.E.2d 30 (1993).

Alternative Method to Appeal Interlocutory Orders. — An interlocutory order not appealable under subsection (b) may nevertheless be appealed pursuant to § 1-277 and § 7A-27(d) of the Rules of Civil Procedure which permit an appeal of an interlocutory order which (1) affects a substantial right, or (2) in effect determines the action and prevents a judgment from which appeal might be taken, or (3) discontinues the action, or (4) grants or refuses a new trial. *Dalton Moran Shook, Inc. v. Pitt Dev. Co.*, 113 N.C. App. 707, 440 S.E.2d 585 (1994).

Applied in *Hare v. Butler*, 99 N.C. App. 693, 394 S.E.2d 231 (1990); *Miller v. Swann Plantation Dev. Co.*, 101 N.C. App. 394, 399 S.E.2d 137 (1991); *Pitt v. Williams*, 101 N.C. App. 402, 399 S.E.2d 366 (1991); *Hoots v. Pryor*, 106 N.C. App. 397, 417 S.E.2d 269 (1992); *McNeil v. Hicks*, 111 N.C. App. 262, 431 S.E.2d 868 (1993); *Gunter v. Anders*, 114 N.C. App. 61, 441 S.E.2d 167 (1994); *Reynolds v. Reynolds*, 114 N.C. App. 393, 442 S.E.2d 133 (1994).

Quoted in *Darcy v. Osborne*, 101 N.C. App. 546, 400 S.E.2d 95 (1991); *Janus Theatres of Burlington, Inc. v. Aragon*, 104 N.C. App. 534, 410 S.E.2d 218 (1991); *Donnelly v. Guilford County*, 107 N.C. App. 289, 419 S.E.2d 365 (1992).

Stated in *Driver v. Burlington Aviation, Inc.*, 110 N.C. App. 519, 430 S.E.2d 476 (1993); *Farm Credit Bank v. Van*

Dorp, 110 N.C. App. 759, 431 S.E.2d 222 (1993); *Thrift v. Food Lion, Inc.*, 111 N.C. App. 758, 433 S.E.2d 481 (1993).

Cited in *Roan-Baker v. Southeastern Hosp. Supply Corp.*, 99 N.C. App. 30, 392 S.E.2d 663 (1990); *Beatty v. Charlotte-Mecklenburg Bd. of Educ.*, 99 N.C. App. 753, 394 S.E.2d 242 (1990); *Myers v. Barringer*, 101 N.C. App. 168, 398 S.E.2d 615 (1990); *Baker v. Rushing*, 104 N.C. App. 240, 409 S.E.2d 108 (1991); *Gardner v. Gardner*, 106 N.C. App. 635, 418 S.E.2d 260 (1992); *Branch Banking & Trust Co. v. Thompson*, 107 N.C. App. 53, 418 S.E.2d 694 (1992); *T.H. Blake Contracting Co. v. Sorrells*, 109 N.C. App. 119, 426 S.E.2d 85 (1993); *Berkeley Fed. Sav. & Loan Ass’n v. Terra Del Sol, Inc.*, 111 N.C. App. 692, 433 S.E.2d 449 (1993); *Richmond County v. North Carolina Low-Level Radioactive Waste Mgt. Auth.*, 335 N.C. 77, 436 S.E.2d 113 (1993); *Beau Rivage Plantation, Inc. v. Melex USA, Inc.*, 112 N.C. App. 446, 436 S.E.2d 152 (1993); *Hartman v. Walkertown Shopping Ctr., Inc.*, 113 N.C. App. 632, 439 S.E.2d 787 (1994); *Dickerson Carolina, Inc. v. Harrelson*, 114 N.C. App. 693, 443 S.E.2d 127 (1994).

II. JUDGMENT ON MULTIPLE CLAIMS OR INVOLVING MULTIPLE PARTIES.

Determination of Fundamental Claim Immediately Appealable. — By ordering a former employee to assign a patent, the trial court effectively decided ownership of the patented process, and where this determination was fundamental to the disposition of the remaining claims, grant of summary judgment on the ownership claim was immediately appealable as affecting a substantial right. *Liggett Group, Inc. v. Sunas*, 113 N.C. App. 19, 437 S.E.2d 674 (1993).

Factors for Immediate Appealability of Judgment. — In order for a judgment in a multiple claim or multiple party action to be immediately appealable, the judgment must be (1) in effect final as to one or more of the claims or parties; and (2) certified for appeal by the trial judge. If the judgment is final as to one or more of the claims or parties but has not been certified for appeal by the trial court, no appeal will lie unless an immediate appeal is authorized by some other rule or statute, such as § 1-277 or § 7A-27. *North Carolina R.R.*

v. City of Charlotte, 112 N.C. App. 762, 437 S.E.2d 393 (1993).

Order Denying Release of Escrow Funds Held Not Appealable. — The effect of an order denying the release of the funds held in escrow under § 58-36-25 was temporary and not permanent where the Commissioner's order only determined that the funds are not to be released now, and did not purport to determine who is entitled to the money; for these reasons, an appeal of the order was interlocutory and was not immediately appealable under either this rule or §§ 1-277 and 7A-27(d). State

ex rel. Comm'r of Ins. v. North Carolina Rate Bureau, 102 N.C. App. 809, 403 S.E.2d 597 (1991).

Denial of Summary Judgment Only Appealable, etc. —

The denial of a motion for summary judgment is not a final judgment, and is generally not immediately appealable, even if the trial court has attempted to certify it for appeal under subsection (b) of this rule. Henderson v. LeBauer, 101 N.C. App. 255, 399 S.E.2d 142, cert. denied, 328 N.C. 731, 404 S.E.2d 868 (1991).

Rule 55. Default.

(a) *Entry.* — When a party against whom a judgment for affirmative relief is sought has failed to plead or is otherwise subject to default judgment as provided by these rules or by statute and that fact is made to appear by affidavit, motion of attorney for the plaintiff, or otherwise, the clerk shall enter his default.

(b) *Judgment.* — Judgment by default may be entered as follows:

- (1) *By the Clerk.* — When the plaintiff's claim against a defendant is for a sum certain or for a sum which can by computation be made certain, the clerk upon request of the plaintiff and upon affidavit of the amount due shall enter judgment for that amount and costs against the defendant, if he has been defaulted for failure to appear and if he is not an infant or incompetent person. A verified pleading may be used in lieu of an affidavit when the pleading contains information sufficient to determine or compute the sum certain.

In all cases wherein, pursuant to this rule, the clerk enters judgment by default upon a claim for debt which is secured by any pledge, mortgage, deed of trust or other contractual security in respect of which foreclosure may be had, or upon a claim to enforce a lien for unpaid taxes or assessments under G.S. 105-414, the clerk may likewise make all further orders required to consummate foreclosure in accordance with the procedure provided in Article 29A of Chapter 1 of the General Statutes, entitled "Judicial Sales."

- (2) *By the Judge.* — In all other cases the party entitled to a judgment by default shall apply to the judge therefor; but no judgment by default shall be entered against an infant or incompetent person unless represented in the action by a guardian ad litem or other such representative who has appeared therein. If the party against whom judgment by default is sought has appeared in the action, he (or, if appearing by representative, his representative) shall be served with written notice of the application for judgment at least three days prior to the hearing on such application. If, in order to enable the judge to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth

of any averment by evidence or to take an investigation of any other matter, the judge may conduct such hearings or order such references as he deems necessary and proper and shall accord a right of trial by jury to the parties when and as required by the Constitution or by any statute of North Carolina. If the plaintiff seeks to establish paternity under Article 3 of Chapter 49 of the General Statutes and the defendant fails to appear, the judge shall enter judgment by default.

(c) *Service by publication.* — When service of the summons has been made by published notice, no judgment shall be entered on default until the plaintiff shall have filed a bond, approved by the court, conditioned to abide such order as the court may make touching the restitution of any property collected or obtained by virtue of the judgment in case a defense is thereafter permitted and sustained; provided, that in actions involving the title to real estate or to foreclose mortgages thereon or in actions in which the State of North Carolina or a county or municipality thereof is the plaintiff such bond shall not be required.

(d) *Setting aside default.* — For good cause shown the court may set aside an entry of default, and, if a judgment by default has been entered, the judge may set it aside in accordance with Rule 60(b).

(e) *Plaintiffs, counterclaimants, cross claimants.* — The provisions of this rule apply whether the party entitled to the judgment by default is a plaintiff, a third-party plaintiff, or a party who has pleaded a crossclaim or counterclaim. In all cases a judgment by default is subject to the limitations of Rule 54(c).

(f) *Judgment against the State of North Carolina.* — No judgment by default shall be entered against the State of North Carolina or an officer in his official capacity or agency thereof unless the claimant establishes his claim or right to relief by evidence. (1967, c. 954, s. 1; 1971, cc. 542, 1101; 1977, c. 675; 1991, c. 278, s. 1; 1993 (Reg. Sess., 1994), c. 733, s. 3.)

Effect of Amendments. — The 1991 amendment, effective June 12, 1991, and applicable to actions commenced on or after that date, near the end of subsection (c) substituted "foreclose" for "foreclosure" and inserted "or in actions in which the State of North Carolina or

a county or municipality thereof is the plaintiff."

The 1993 (Reg. Sess., 1994) amendment, effective August 1, 1994, and applicable to civil actions commenced on or after that date, added the last sentence of subdivision (b)(2).

CASE NOTES

- I. In General.
- II. Entry of Default.
- III. Entry of Judgment by Default.
 - B. By Judge.
- IV. Setting Aside Default.

I. IN GENERAL.

Applied in *Roan-Baker v. Southeastern Hosp. Supply Corp.*, 99 N.C. App. 30, 392 S.E.2d 663 (1990); *John Henry Spainhour & Sons Grading Co. v. Caro-*

lina E.E. Homes, Inc., 109 N.C. App. 174, 426 S.E.2d 728 (1993).

Cited in *Sunamerica Fin. Corp. v. Bonham*, 328 N.C. 254, 400 S.E.2d 435 (1991); *Jennings v. Jessen*, 103 N.C. App. 739, 407 S.E.2d 264 (1991); *O'Neal*

v. Murray, 105 N.C. App. 102, 411 S.E.2d 628 (1992).

II. ENTRY OF DEFAULT.

Interlocutory Entry of Default. — Where the trial court in its findings of fact referred to petitioner's "Motion for Entry of Default" and concluded that "the Clerk shall sign and file the Entry of Default, if not already signed and filed," and where the trial court then set for hearing a determination as to the money and property taken, damages caused, and "all other things" taken, the order entered by the trial court was not a final order or final judgment but was an interlocutory entry of default and not subject to appellate review. *Duncan v. Duncan*, 102 N.C. App. 107, 401 S.E.2d 398 (1991).

Effect of Entry of Default. — The effect of an entry of default is that the defendant against whom entry of default is made is deemed to have admitted the allegations in plaintiff's complaint and is prohibited from defending on the merits of the case. *Spartan Leasing, Inc. v. Pollard*, 101 N.C. App. 450, 400 S.E.2d 476 (1991).

Default Entered Properly. — Denial of the defendants' motion to set aside entry of default was not in error. *RC Assocs. v. Regency Ventures, Inc.*, 111 N.C. App. 367, 432 S.E.2d 394 (1993).

III. ENTRY OF JUDGMENT BY DEFAULT.

B. By Judge.

When Judgment Must Be Entered by Judge. —

Where the claim is not for a sum certain or for a sum which can by computation be made certain, the party entitled to the default judgment must make his application to a judge. *Grant v. Cox*, 106 N.C. App. 122, 415 S.E.2d 378 (1992).

IV. SETTING ASIDE DEFAULT.

Attack of Default Judgment on Appeal. — Failure to attack default judgment at the trial court level precludes such an attack on appeal. *University of*

N.C. v. Shoemate, 113 N.C. App. 205, 437 S.E.2d 892 (1994).

Party May Not Claim Judgment Is Defective After Accepting Its Benefits. — After petitioning the court to enter a default judgment, plaintiff relied upon its validity and force thrice — by executing on it; by retaining the money collected by execution; and by suing defendant in a separate action for future rents. The law does not permit a party to claim that a judgment is defective after relying upon its validity and accepting its benefits. *Kimzey Winston-Salem, Inc. v. Jester*, 103 N.C. App. 77, 404 S.E.2d 176, cert. denied, 329 N.C. 497, 407 S.E.2d 534 (1991).

An order reopening and enlarging a default judgment was erroneous because, by deciding to obtain a final judgment for the sum certain that was owed when the default judgment was entered, rather than to have the damages determined later by a trial, plaintiff waived any right it might have had to obtain judgment for a larger amount. *Kimzey Winston-Salem, Inc. v. Jester*, 103 N.C. App. 77, 404 S.E.2d 176, cert. denied, 329 N.C. 497, 407 S.E.2d 534 (1991).

Superior court order which kept a default judgment in effect and permitted it to be enlarged from \$7,039 to \$35,857 was erroneous because the court had no authority to enter it. The order neither set aside the default judgment nor relieved plaintiff of it as authorized by this rule or § 1A-1, Rule 60(b), N.C.R.Civ.P. *Kimzey Winston-Salem, Inc. v. Jester*, 103 N.C. App. 77, 404 S.E.2d 176, cert. denied, 329 N.C. 497, 407 S.E.2d 534 (1991).

Motion for Relief on Grounds of Insufficient Service. — In filing a motion to claim exempt property, which was inconsistent with her later motion for relief from judgment on the grounds of the invalidity of service of process, defendant made a general appearance, and her subsequent motion for relief from a default judgment on the grounds of the invalidity of service of process was properly dismissed. *Faucette v. Dickerson*, 103 N.C. App. 620, 406 S.E.2d 602 (1991).

Rule 56. Summary judgment.

Legal Periodicals. —

For Survey of Developments in North

Carolina Law (1992), see 71 N.C.L. Rev. 1893 (1993).

CASE NOTES

- I. In General.
- III. Propriety of Summary Judgment.
 - A. In General.
 - B. Particular Types of Actions, etc.
 - C. Cases in Which Summary Judgment Held Proper.
 - D. Cases in Which Summary Judgment Held Improper.
- IV. Burden on Motion for Summary Judgment.
- V. Function of Trial Court.
- VI. Evidence on Motion.
 - A. In General.
 - B. Form of Affidavits and Other Evidence.
- VIII. Time of Motion and Hearing.
- IX. Notice.
- X. Service and Filing of Affidavits.

I. IN GENERAL.

Conversion of § 1A-1, Rule 12(b)(6) and 12(c) Motions to Motions, etc. —

In accord with ninth paragraph in main volume. See *King v. Durham County Mental Health Developmental Disabilities & Substance Abuse Auth.*, 113 N.C. App. 341, 439 S.E.2d 771 (1994).

Summary Judgment for Non-movant. — Although plaintiffs filed motion for summary judgment, trial court entered summary judgment for defendants. When appropriate, summary judgment may be rendered against the party moving for such judgment. *Coulter v. City of Newton*, 100 N.C. App. 523, 397 S.E.2d 244 (1990).

Pleadings Deemed Amended. — Where a motion for summary judgment is supported by matters outside the pleadings, the pleadings are deemed amended if in fact the issue not raised by the pleadings or by the motion for summary judgment is tried by the express or implied consent of both parties. *County of Rutherford ex rel. Child Support Enforcement Agency ex rel. Hedrick v. Whitener*, 100 N.C. App. 70, 394 S.E.2d 263 (1990).

Because the plaintiffs' summary judgment motion went only to liability, the trial court had the power to render summary judgment for the defendants with respect to liability notwithstanding the procedural defects in the defendants' summary judgment motion.

Messer v. Laurel Hill Assocs., 102 N.C. App. 307, 401 S.E.2d 843 (1991).

Entry of Summary Judgment. —

The mere filing of an affirmative defense without more is not sufficient to establish the absence of a justiciable issue, nor is the grant of a § 1A-1, Rule 12(b)(6) motion, nor the entry of summary judgment. These events may only be evidence of the absence of a justiciable issue. However, action by the losing party which perpetuated litigation in the fact of events substantially establishing that the pleadings no longer presented a justiciable controversy may also serve as evidence for purposes of § 6-21.5. *Sunamerica Fin. Corp. v. Bonham*, 328 N.C. 254, 400 S.E.2d 435 (1991).

Distinction Between Motion to Dismiss and Summary Judgment. —

The distinction between a § 1A-1, Rule 12(b)(6) motion to dismiss and a motion for summary judgment is more than a mere technicality. When considering a § 1A-1, Rule 12(b)(6) motion to dismiss, the trial court need only look to the face of the complaint to determine whether it reveals an insurmountable bar to plaintiff's recovery. By contrast, when considering a summary judgment motion, the trial court must look at more than the pleadings; it must also consider additional matters such as affidavits, depositions and other specified matter outside the pleadings. *Locus v. Fayetteville State Univ.*, 102 N.C. App. 522, 402 S.E.2d 862 (1991).

Ordinarily, findings of fact and conclusions of law are not required in the determination of a motion for summary judgment, and if these are made, they are disregarded on appeal. *Sunamerica Fin. Corp. v. Bonham*, 328 N.C. 254, 400 S.E.2d 435 (1991).

Attorneys' Fees. — Section 6-21.5 provides in part that the entry of judgment pursuant to Rule 50 or this rule may be some evidence that an attorneys' fee may be warranted. The statute's reference to these rules, which are applicable only if evidence in addition to the pleadings is before the court, thus implies that when deciding whether to grant a motion under § 6-21.5 the trial court may consider evidence developed after the pleadings have been filed. *Sunamerica Fin. Corp. v. Bonham*, 328 N.C. 254, 400 S.E.2d 435 (1991).

Applied in *Pulley v. Rex Hosp.*, 326 N.C. 701, 392 S.E.2d 380 (1990); *BarclaysAmerican/Leasing, Inc. v. North Carolina Ins. Guar. Ass'n*, 99 N.C. App. 290, 392 S.E.2d 772 (1990); *Kearney v. County of Durham*, 99 N.C. App. 349, 393 S.E.2d 129 (1990); *Lowry v. Lowry*, 99 N.C. App. 246, 393 S.E.2d 141 (1990); *Medley v. North Carolina Dep't of Cor.*, 99 N.C. App. 296, 393 S.E.2d 288 (1990); *Jones Cooling & Heating, Inc. v. Booth*, 99 N.C. App. 757, 394 S.E.2d 292 (1990); *Raleigh Fed. Sav. Bank v. Godwin*, 99 N.C. App. 761, 394 S.E.2d 294 (1990); *Mozingo ex rel. Thomas v. Pitt County Mem. Hosp.*, 101 N.C. App. 578, 400 S.E.2d 747 (1991); *Nisbet v. Nisbet*, 102 N.C. App. 232, 402 S.E.2d 151 (1991); *Spartan Leasing, Inc. v. Pollard*, 101 N.C. App. 450, 400 S.E.2d 476 (1991); *Rogers v. T.J.X. Cos.*, 329 N.C. 226, 404 S.E.2d 664 (1991); *Easterwood v. Burge*, 103 N.C. App. 507, 405 S.E.2d 787 (1991); *Diorio v. Penny*, 103 N.C. App. 407, 405 S.E.2d 789 (1991); *Triad Bank v. Educational Consultants, Inc.*, 103 N.C. App. 483, 405 S.E.2d 800 (1991); *Isbey v. Cooper Cos.*, 103 N.C. App. 774, 407 S.E.2d 254 (1991); *Anders v. Hyundai Motor Am. Corp.*, 104 N.C. App. 61, 407 S.E.2d 618 (1991); *Gray v. Small*, 104 N.C. App. 222, 408 S.E.2d 538 (1991); *Safety Mut. Cas. Corp. v. Spears*, 104 N.C. App. 467, 409 S.E.2d 736 (1991); *Rose v. Steen Cleaning, Inc.*, 104 N.C. App. 539, 410 S.E.2d 221 (1991); *Mothershed v. Schrimsher*, 105 N.C. App. 209, 412 S.E.2d 123 (1992); *Roumillat v. Simplistic Enters., Inc.*, 331 N.C. 57, 414 S.E.2d 339 (1992); *Lenzer v. Flaherty*, 106 N.C.

App. 496, 418 S.E.2d 276 (1992); *White-side v. Lawyers Sur. Corp.*, 107 N.C. App. 230, 418 S.E.2d 829 (1992); *Thomco Realty, Inc. v. Helms*, 107 N.C. App. 224, 418 S.E.2d 834 (1992); *Catawba County Horsemen's Ass'n v. Deal*, 107 N.C. App. 213, 419 S.E.2d 185 (1992); *Canady v. Mann*, 107 N.C. App. 252, 419 S.E.2d 597 (1992); *Goodman v. Wenco Foods, Inc.*, 331 N.C. 1, 423 S.E.2d 444 (1992); *Kirkland v. National Civic Assistance Group, Inc.*, 108 N.C. App. 326, 423 S.E.2d 822 (1992); *AT & T Family Fed. Credit Union v. Beaty Wrecker Serv., Inc.*, 108 N.C. App. 611, 425 S.E.2d 427 (1993); *McMurry v. Cochrane Furn. Co.*, 109 N.C. App. 52, 425 S.E.2d 735 (1993); *Smith v. State Farm Fire & Cas. Co.*, 109 N.C. App. 276, 426 S.E.2d 457 (1993); *Wachovia Bank & Trust Co. v. Templeton Oldsmobile-Cadillac-Pontiac, Inc.*, 109 N.C. App. 352, 427 S.E.2d 629 (1993); *Cowan v. Brian Ctr. Mgt. Corp.*, 109 N.C. App. 443, 428 S.E.2d 263 (1993); *United States v. Real Property*, 814 F. Supp. 468 (W.D.N.C. 1993); *Holloway v. Wachovia Bank & Trust Co.*, 109 N.C. App. 403, 428 S.E.2d 453 (1993); *Dickens v. Thorne*, 110 N.C. App. 39, 429 S.E.2d 176 (1993); *Jefferson-Pilot Life Ins. Co. v. Spencer*, 110 N.C. App. 194, 429 S.E.2d 583 (1993); *Reece v. Homette Corp.*, 110 N.C. App. 462, 429 S.E.2d 768 (1993); *APAC-Carolina, Inc. v. Greensboro-High Point Airport Auth.*, 110 N.C. App. 664, 431 S.E.2d 508 (1993); *State ex rel. State Art Museum Bldg. Comm'n v. Travelers Indem. Co.*, 111 N.C. App. 330, 432 S.E.2d 419 (1993); *L.B. Best Furn. Distribs., Inc. v. Capital Delivery Serv., Inc.*, 111 N.C. App. 405, 432 S.E.2d 437 (1993); *Morgan v. Cavalier Acquisition Corp.*, 111 N.C. App. 520, 432 S.E.2d 915 (1993); *Berkeley Fed. Sav. & Loan Ass'n v. Terra Del Sol, Inc.*, 111 N.C. App. 692, 433 S.E.2d 449 (1993); *Butz v. Holder*, 112 N.C. App. 116, 434 S.E.2d 862 (1993); *Miller v. Talton*, 112 N.C. App. 484, 435 S.E.2d 793 (1993); *Gregory v. Floyd*, 112 N.C. App. 470, 435 S.E.2d 808 (1993); *Phelps v. Vasse*, 113 N.C. App. 132, 437 S.E.2d 692 (1993); *Owens v. W.K. Deal Printing, Inc.*, 113 N.C. App. 324, 438 S.E.2d 440 (1994); *First Citizens Bank & Trust Co. v. McLamb*, 112 N.C. App. 645, 439 S.E.2d 166 (1994); *Varner v. Bryan*, 113 N.C. App. 697, 440 S.E.2d 295 (1994); *McKeithan v. CSX Transp., Inc.*, 113 N.C. App. 818, 440 S.E.2d 312 (1994); *DOT v. Idol*, 114 N.C. App. 98, 440 S.E.2d 863 (1994);

Dunleavy v. Yates Constr. Co., 114 N.C. App. 196, 442 S.E.2d 53 (1994); *Coffin v. ISS Oxford Servs., Inc.*, 114 N.C. App. 802, 443 S.E.2d 352 (1994).

Quoted in *Muther-Ballenger v. Giffin Elec. Consultants, Inc.*, 100 N.C. App. 505, 397 S.E.2d 247 (1990); *Busby v. Simmons*, 103 N.C. App. 592, 406 S.E.2d 628 (1991); *Mitchell v. Golden*, 107 N.C. App. 413, 420 S.E.2d 482 (1992); *Eury v. Nationwide Mut. Ins. Co.*, 109 N.C. App. 303, 426 S.E.2d 442 (1993); *Beavers v. Federal Ins. Co.*, 113 N.C. App. 254, 437 S.E.2d 881 (1994); *Andersen v. Baccus*, 335 N.C. 526, 439 S.E.2d 136 (1994); *Universal Leaf Tobacco Co. v. Oldham*, 113 N.C. App. 490, 439 S.E.2d 179 (1994).

Stated in *Bass v. North Carolina Farm Bureau Mut. Ins. Co.*, 100 N.C. App. 728, 398 S.E.2d 47 (1990); *Ryles v. Durham Co. Hosp. Corp.*, 107 N.C. App. 455, 420 S.E.2d 487 (1992); *Watson Elec. Constr. Co. v. City of Winston-Salem*, 109 N.C. App. 194, 426 S.E.2d 420 (1993); *Glover v. First Union Nat'l Bank*, 109 N.C. App. 451, 428 S.E.2d 206 (1993); *Ragan v. Hill*, 110 N.C. App. 648, 430 S.E.2d 489 (1993); *Courts v. Annie Penn Mem. Hosp.*, 111 N.C. App. 134, 431 S.E.2d 864 (1993); *Hales v. North Carolina Ins. Guar. Ass'n*, 111 N.C. App. 892, 433 S.E.2d 468 (1993); *Thrift v. Food Lion, Inc.*, 111 N.C. App. 758, 433 S.E.2d 481 (1993); *Liggett Group, Inc. v. Sunas*, 113 N.C. App. 19, 437 S.E.2d 674 (1993); *New S. Ins. Co. v. Kidd*, 114 N.C. App. 749, 443 S.E.2d 85 (1994).

Cited in *United Carolina Bank v. Tucker*, 99 N.C. App. 95, 392 S.E.2d 410 (1990); *Kaplan v. First Union Nat'l Bank*, 99 N.C. App. 570, 393 S.E.2d 344 (1990); *Yates Constr. Co. v. Greenleaf Corp.*, 99 N.C. App. 489, 393 S.E.2d 563 (1990); *Stallings v. Gunter*, 99 N.C. App. 710, 394 S.E.2d 212 (1990); *Stegall v. Stegall*, 100 N.C. App. 398, 397 S.E.2d 306 (1990); *Brooks v. Hackney*, 100 N.C. App. 562, 397 S.E.2d 361 (1990); *Harroff v. Harroff*, 100 N.C. App. 686, 398 S.E.2d 340 (1990); *Medlin v. Bass*, 327 N.C. 587, 398 S.E.2d 460 (1990); *Chrisalis Properties, Inc. v. Separate Quarters, Inc.*, 101 N.C. App. 81, 398 S.E.2d 628 (1990); *Raritan River Steel Co. v. Cherry, Bekaert & Holland*, 101 N.C. App. 1, 398 S.E.2d 889 (1990); *Dale v. Town of Columbus*, 101 N.C. App. 335, 399 S.E.2d 350 (1991); *Bell Arthur Water Corp. v. DOT*, 101 N.C. App. 305, 399 S.E.2d 353 (1991); *Whittington v. North Carolina Dep't of Human Re-*

sources, 100 N.C. App. 603, 398 S.E.2d 40 (1990); *Suarez v. Food Lion, Inc.*, 100 N.C. App. 700, 398 S.E.2d 60 (1990); *HCA Crossroads Residential Ctrs. Inc. v. North Carolina Dep't of Human Resources*, 327 N.C. 573, 398 S.E.2d 466 (1990); *Commonwealth Land Title Ins. Co. v. Stephenson*, 101 N.C. App. 379, 399 S.E.2d 380 (1991); *Greer v. Parsons*, 103 N.C. App. 463, 405 S.E.2d 921 (1991); *Raritan River Steel Co. v. Cherry, Bekaert & Holland*, 329 N.C. 646, 407 S.E.2d 178 (1991); *Vulcan Materials Co. v. Iredell County*, 103 N.C. App. 779, 407 S.E.2d 283 (1991); *North Carolina R.R. v. Ferguson Bldrs. Supply*, 103 N.C. App. 768, 407 S.E.2d 296 (1991); *Pulliam v. City of Greensboro*, 103 N.C. App. 748, 407 S.E.2d 567 (1991); *Toms v. Lawyers Mut. Liab. Ins. Co.*, 104 N.C. App. 88, 408 S.E.2d 206 (1991); *Yates v. Haley*, 103 N.C. App. 604, 406 S.E.2d 659 (1991); *Salt v. Applied Analytical, Inc.*, 104 N.C. App. 652, 412 S.E.2d 97 (1991); *Howell v. Town of Carolina Beach*, 106 N.C. App. 410, 417 S.E.2d 277 (1992); *IRA ex rel. Oppenheimer v. Brenner Cos.*, 107 N.C. App. 16, 419 S.E.2d 354 (1992); *Pendergrass v. Card Care, Inc.*, 333 N.C. 233, 424 S.E.2d 391 (1993); *Black v. Western Carolina Univ.*, 109 N.C. App. 209, 426 S.E.2d 733 (1993); *Munie v. Tangle Oaks Corp.*, 109 N.C. App. 336, 427 S.E.2d 149 (1993); *Keene Convenient Mart, Inc. v. SSS Band Backers*, 109 N.C. App. 384, 427 S.E.2d 322 (1993); *Foster v. Federal Emergency Mgt. Agency*, 984 F.2d 128 (4th Cir. 1993); *Delta Marine, Inc. v. Whaley*, 813 F. Supp. 414 (E.D.N.C. 1993); *Boyd v. Nationwide Mut. Ins. Co.*, 108 N.C. App. 536, 424 S.E.2d 168 (1993); *Gibson v. Hunsberger*, 109 N.C. App. 671, 428 S.E.2d 489 (1993); *Cherry v. Harris*, 110 N.C. App. 478, 429 S.E.2d 771 (1993); *Nationwide Mut. Ins. Co. v. Anderson*, 111 N.C. App. 248, 431 S.E.2d 552 (1993); *Swain v. Leahy*, 111 N.C. App. 884, 433 S.E.2d 460 (1993); *Huffaker v. Holley*, 111 N.C. App. 914, 433 S.E.2d 474 (1993); *Gardner v. Gardner*, 334 N.C. 662, 435 S.E.2d 324 (1993); *Nationwide Mut. Ins. Co. v. Public Serv. Co.*, 112 N.C. App. 345, 435 S.E.2d 561 (1993); *Alt v. Parker*, 112 N.C. App. 307, 435 S.E.2d 773 (1993); *Wilkinson v. SRW/Cary Assocs.*, 112 N.C. App. 846, 437 S.E.2d 3 (1993); *Padgett v. J.C. Penney Co.*, 112 N.C. App. 842, 437 S.E.2d 401 (1993); *University of N.C. v. Shoemate*, 113 N.C. App. 205, 437

S.E.2d 892 (1994); *Adams v. Jones*, 114 N.C. App. 256, 441 S.E.2d 699 (1994); *Crowell Constructors, Inc. v. State ex rel. Cobey*, 114 N.C. App. 75, 440 S.E.2d 848 (1994); *State Farm Mut. Auto. Ins. Co. v. Branch*, 114 N.C. App. 234, 441 S.E.2d 586 (1994); *Powell v. S & G Prestress Co.*, 114 N.C. App. 319, 442 S.E.2d 143 (1994); *Williams v. Paley*, 114 N.C. App. 571, 442 S.E.2d 558 (1994); *Kraft Foodservice, Inc. v. Hardee*, 114 N.C. App. 811, 443 S.E.2d 106 (1994).

III. PROPRIETY OF SUMMARY JUDGMENT.

A. In General.

Summary Judgment to Be Granted Only Where No Genuine Issue of Material Fact Is Presented. —

Evidence held insufficient to establish any genuine issue of material fact. *Long v. Vertical Technologies, Inc.*, 113 N.C. App. 598, 439 S.E.2d 797 (1994).

And Where a Party Is Entitled to Judgment, etc. —

In accord with first paragraph in main volume. See *Vance v. Wiley T. Booth, Inc.*, 112 N.C. App. 600, 436 S.E.2d 256 (1993); *Padgett v. J.C. Penney Co.*, 112 N.C. App. 842, 437 S.E.2d 401 (1993).

The failure of the defendant to plead *res judicata* is not a bar to that issue being raised at hearing on summary judgment. *County of Rutherford ex rel. Child Support Enforcement Agency ex rel. Hedrick v. Whitener*, 100 N.C. App. 70, 394 S.E.2d 263 (1990).

When defendant establishes a complete defense, etc. —

A defending party is entitled to summary judgment if it can establish that no claim for relief exists or that the claimant cannot overcome an affirmative defense or legal bar to the claim. *Wilder v. Hobson*, 101 N.C. App. 199, 398 S.E.2d 625 (1990).

Plaintiff's bare assertions, etc. —

Where plaintiff made a motion for summary judgment, which was denied, and later plaintiff filed a second motion for summary judgment involving the same issue as presented by the initial motion, the trial court erred by granting plaintiff's second motion for summary judgment. *Taylorsville Fed. Savs. & Loan Ass'n v. Keen*, 110 N.C. App. 784, 431 S.E.2d 484 (1993).

B. Particular Types of Actions, etc.

Termination of Parental Rights. —

Article 24B of Chapter 7A (§ 7A-289.22 et seq.) does not provide for a summary proceeding to determine whether the petitioner has proven the existence of one or more of the grounds for termination. Thus, the trial court erred in granting petitioners' motion for partial summary judgment. *Curtis v. Curtis*, 104 N.C. App. 625, 410 S.E.2d 917 (1991).

Assignments. — Generally, the interpretation of an assignment is governed by rules applicable to the interpretation of a contract. If there is no ambiguity regarding the subject matter of the assignment, the plaintiff's intent can be interpreted without resort to extrinsic evidence and summary judgment may be appropriate. *Martin v. Ray Lackey Enters., Inc.*, 100 N.C. App. 349, 396 S.E.2d 327 (1990).

Shareholders' Derivative Actions.

— For a case discussing interplay of rules and statutes governing procedure and discovery in shareholders' derivative action, particularly with respect to former § 55-55(c) (see now § 55-7-40(d)), this rule, and § 1A-1, Rules 12 and 23, see *Alford v. Shaw*, 327 N.C. 526, 398 S.E.2d 445 (1990).

Lack of Verification Pursuant to § 1A-1, Rule 23(b). — Because the verification requirement in § 1A-1, Rule 23(b) is not jurisdictional in nature, where the purposes behind the rule have been fulfilled by the time the objection to a defective or absent verification is lodged, dismissal or summary judgment in favor of defendants is not appropriate. *Alford v. Shaw*, 327 N.C. 526, 398 S.E.2d 445 (1990).

C. Cases in Which Summary Judgment Held Proper.

Libel Claim. — Trial court did not err in granting defendants' motion for summary judgment on plaintiffs' libel claim. *Martin Marietta Corp. v. Wake Stone Corp.*, 111 N.C. App. 269, 432 S.E.2d 428 (1993).

Intentional Infliction of Emotional Distress. — Where one plaintiff could place no time period in which defendant allegedly intentionally inflicted emotional distress, and where she was unable to place a day, month or year on any of the specific events she alleged, there was simply no evidence to indicate that any of the alleged incidents regarding plaintiff took place within the three-year statute of limitations period, and the trial court did not err in granting summary judgment to defendant against

that plaintiff. *Waddle v. Sparks*, 100 N.C. App. 129, 394 S.E.2d 683 (1990), modified on other grounds, 331 N.C. 73, 412 S.E.2d 22 (1992).

Action to Quiet Title Based on Fraud. — Where the cause of action is in fraud, the defendants would have a basic right to a jury trial. However, judge in action to quiet title based on fraud and on construction of deed considered only the intent of the parties in the deed in question and did not reach the issue of fraud. Once the intent was determined from the four corners of the deed, "fraud" no longer mattered and no jury trial was necessary; therefore, the judge was able to dispose of the case on a judgment on the pleadings. *Mason-Reel v. Simpson*, 100 N.C. App. 651, 397 S.E.2d 755 (1990).

D. Cases in Which Summary Judgment Held Improper.

Deed of Trust. — Where there was a genuine issue of fact as to the extent to which deed of trust secured amounts additional to purchase price of shopping center property summary judgment was improper. *Dalton Moran Shook, Inc. v. Pitt Dev. Co.*, 113 N.C. App. 707, 440 S.E.2d 585 (1994).

Automobile Accident. — In action for damages arising out of automobile accident, trial court erred in granting defendant's motion for summary judgment. *Mobley v. Estate of Johnson*, 111 N.C. App. 422, 432 S.E.2d 425 (1993).

In an action for constructive fraud and constructive trust, summary judgment for defendant attorney was precluded by a genuine issue of material fact as to the existence of an attorney-client relationship at the time a referral fee arrangement was made. *Booher v. Frue*, 98 N.C. App. 585, 392 S.E.2d 105 (1990).

Intentional Infliction of Emotional Distress. — Where plaintiff's allegations were sufficient to establish that defendant's behavior constituted more than insults or unflattering opinions the trial court erred in granting summary judgment in favor of defendant with regard to suit alleging intentional inflictions of emotional distress, as there were sufficient facts alleged to raise a question of whether defendant's conduct was extreme and outrageous. *Waddle v. Sparks*, 100 N.C. App. 129, 394 S.E.2d 683 (1990).

Libel and Slander. — There was ample evidence to withstand summary

judgment in the record of libel and slander case that defendant's statement was false and made with actual malice; defendant's firing of plaintiff within days after newspaper published a letter from plaintiff's mother in support of defendant's political opponent, and the vehement character of the statement to the newspaper were some evidence of defendant's ill-will toward plaintiff. Plaintiff also introduced evidence that he was competent at his job as assistant district attorney. *Clark v. Brown*, 99 N.C. App. 255, 393 S.E.2d 134 (1990).

Mitigation of Damages. — Defendant's affidavit presented a genuine issue of material fact as to the adequacy of plaintiff's attempted mitigation of damages; therefore, the trial court incorrectly granted summary judgment on the issue of damages. *RC Assocs. v. Regency Ventures, Inc.*, 111 N.C. App. 367, 432 S.E.2d 394 (1993).

Piercing the Corporate Veil. — Because only one of several factors that can justify a court in piercing the corporate veil and treating a corporation as the alter ego of its officers or stockholders was established without contradiction by the materials in the record, the court correctly denied plaintiff's motion for summary judgment on the issue of piercing the corporate veil. *Hoots v. Toms & Bazzle*, 100 N.C. App. 412, 396 S.E.2d 820 (1990).

Contributory Negligence of Paper Mill Operator. — Genuine issues of fact, precluding summary judgment, existed as to whether a paper mill owner was contributorily negligent in operating a continuous digester system which the owner alleged had been improperly designed and installed by the system's manufacturer. *Federal Paper Bd. Co. v. Kamyr, Inc.*, 101 N.C. App. 329, 399 S.E.2d 411 (1991), discretionary review denied, 328 N.C. 570, 403 S.E.2d 510 (1991).

IV. BURDEN ON MOTION FOR SUMMARY JUDGMENT.

Showing That Opponent Cannot Produce Evidence to Support Its Claim Satisfies Burden. —

To succeed in a summary judgment motion, the movant has the burden of showing, based on pleadings, depositions, answers, admissions, and affidavits, there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. Defendant may meet this burden by showing

either (1) an essential element of the non-movant's claim is nonexistent, (2) the non-movant cannot produce evidence to support an essential element of his claim, (3) or the nonmovant cannot surmount an affirmative defense which would bar his claim. *Taylor v. Ashburn*, 112 N.C. App. 604, 436 S.E.2d 276 (1993).

V. FUNCTION OF TRIAL COURT.

As a Summary of Undisputed Facts, etc. —

Orders granting summary judgment under this rule do not normally contain detailed findings of fact. However, if the findings of fact are actually the trial court's summation of the undisputed facts which support the judgment, findings of fact and conclusions of law do not render a summary judgment void or voidable. *Noel Williams Masonry, Inc. v. Vision Contractors*, 103 N.C. App. 597, 406 S.E.2d 605 (1991).

VI. EVIDENCE ON MOTION.

A. In General.

Where the record did not show that plaintiff objected to parol evidence in the form of affidavits submitted by the defendants, the facts set out in these affidavits were competent evidence to be considered by the trial court in ruling upon motions for summary judgment. *Lindsey v. North Carolina Farm Bureau Mut. Ins. Co.*, 103 N.C. App. 432, 405 S.E.2d 803 (1991).

Failure to Object to Affidavits. — Even if affidavits of two defendants contained evidence of settlement negotiations made inadmissible by § 8C-1, Rule 408, plaintiff could not assert their admission as error on appeal where plaintiff failed to object or move to strike the affidavits. *Lindsey v. North Carolina Farm Bureau Mut. Ins. Co.*, 103 N.C. App. 432, 405 S.E.2d 803 (1991).

B. Form of Affidavits and Other Evidence.

Where Requirements of Section (e) Are Met. —

Affidavits used by either party must comply with the requirements of this rule, that is, they must be based on personal knowledge, must set forth facts which would be admissible in evidence, and must show that the affiant is competent to testify to the matters stated in the affidavit. *Taylor v. Taylor Prods. Inc.*, 105 N.C. App. 620, 414 S.E.2d 568

(1992), overruled on other grounds, 334 N.C. 303, 432 S.E.2d 347 (1993).

VIII. TIME OF MOTION AND HEARING.

Hearing on Motion While Discovery Is Pending, etc. —

In accord with the main volume. See *Kirkhart v. Saieed*, 107 N.C. App. 293, 419 S.E.2d 580 (1992).

IX. NOTICE.

Noncompliance with subsection (c) of this rule may be waived by the person entitled to the notice. *Messer v. Laurel Hill Assocs.*, 102 N.C. App. 307, 401 S.E.2d 843 (1991).

The person entitled to notice pursuant to subsection (c) of this rule waives it when he participates in the hearing but does not object to the improper notice. *Messer v. Laurel Hill Assocs.*, 102 N.C. App. 307, 401 S.E.2d 843 (1991).

Waiver of Notice. — The notice required by this rule may be waived by participation in the hearing and by a failure to object to the lack of notice or failure to request additional time by the non-moving party. *Patrick v. Ronald Williams, Professional Ass'n*, 102 N.C. App. 355, 402 S.E.2d 452 (1991).

No reversible error where defendants not prejudiced by untimely notice. — Trial court did not commit reversible error in granting summary judgment in favor of plaintiff although plaintiff failed to give timely notice to appellants of said motion pursuant to § 1A-1, Rule 6(e) and section (c) of this rule. Plaintiff conceded that the Notice of the Summary Judgment Hearing was served by mail only nine days prior to the hearing instead of 13 days as required; however, defendants failed to demonstrate any prejudice caused them by the untimely notice. *Symons Corp. v. Quality Concrete Constr., Inc.*, 108 N.C. App. 17, 422 S.E.2d 365 (1992).

X. SERVICE AND FILING OF AFFIDAVITS.

Failure to File Opposing Affidavits Prior to Day of Hearing. — This rule specifically provides that the moving party is required to submit supporting affidavits which would set forth the moving party's basis for the motion and that opposing affidavits should be filed prior to the day of the hearing. Where plaintiff did not attempt to present op-

posing affidavits until the day of the hearing, her argument that she was not required to respond to defendant's motion for summary judgment until defendant had carried out his burden and the basis for his motion became clear was meritless. *Battle v. Nash Technical College*, 103 N.C. App. 120, 404 S.E.2d 703 (1991).

When Filing on Date of Hearing Permitted. — Despite the specific language of section (c) of this rule requiring affidavits to be filed prior to the day of hearing, the trial court may in some instances permit the filing of the affidavits at a later time. If a request for permission to file affidavits at some later time is made before the date of the summary judgment hearing, the trial court may in its discretion order the period for filing affidavits to be enlarged. *Battle v. Nash Technical College*, 103 N.C. App. 120, 404 S.E.2d 703 (1991).

If a request for permission to file affidavits in support of a motion under this

rule is made on the day of the summary judgment hearing, the trial court may permit the act to be done where the failure to act was the result of excusable neglect. *Battle v. Nash Technical College*, 103 N.C. App. 120, 404 S.E.2d 703 (1991).

Where there was no request for enlargement of time within which to file and serve any affidavits made by the plaintiff prior to the day of the hearing of the motion on summary judgment and there was no finding or a request by the plaintiff for a finding of excusable neglect in failing to serve the affidavits prior to that date, because the plaintiff failed to proceed in a manner that would permit the trial court to exercise its discretion to permit the filing of plaintiff's proffered affidavit, the plaintiff could not on appeal complain about its exclusion. *Battle v. Nash Technical College*, 103 N.C. App. 120, 404 S.E.2d 703 (1991).

Rule 57. Declaratory judgments.

CASE NOTES

Applied in *Alphatronix, Inc. v. Pinacle Micro, Inc.*, 814 F. Supp. 455 (M.D.N.C. 1993).

Rule 58. Entry of judgment.

Subject to the provisions of Rule 54(b), a judgment is entered when it is reduced to writing, signed by the judge, and filed with the clerk of court. The party designated by the judge or, if the judge does not otherwise designate, the party who prepares the judgment, shall serve a copy of the judgment upon all other parties within three days after the judgment is entered. Service and proof of service shall be in accordance with Rule 5. If service is by mail, three days shall be added to the time periods prescribed by Rule 50(b), Rule 52(b), and Rule 59. All time periods within which a party may further act pursuant to Rule 50(b), Rule 52(b), or Rule 59 shall be tolled for the duration of any period of noncompliance with this service requirement, provided however that no time period under Rule 50(b), Rule 52(b), or Rule 59 shall be tolled longer than 90 days from the date the judgment is entered. Consent for the signing and entry of a judgment out of term, session, county, and district shall be deemed to have been given unless an express objection to such action was made on the record prior to the end of the term or session at which the matter was heard.

Notwithstanding any other law to the contrary, any judgment entered by a magistrate in a small claims action pursuant to Article 19 of Chapter 7A shall be entered in accordance with this Rule except judgments announced and signed in open court at the con-

clusion of a trial are considered to be served on the parties, and copies of any judgment not announced and signed in open court at the conclusion of a trial shall be served by the magistrate on all parties in accordance with this Rule, within three days after the judgment is entered. If service is by mail, three days shall be added to the time periods prescribed by G.S. 7A-228. All time periods within which a party may further act pursuant to G.S. 7A-228 shall be tolled for the duration of any period of noncompliance of this service requirement, provided that no time period shall be tolled longer than 90 days from the date judgment is entered. (1967, c. 954, s. 1; 1993 (Reg. Sess., 1994), c. 594, s. 1.)

Effect of Amendments. — The 1993 (Reg. Sess., 1994) amendment, effective October 1, 1994, and applicable to all

judgments subject to entry on or after that date, rewrote this section.

CASE NOTES

Requirements for Completed Entry of Judgment. — Paragraph three of this rule specifies three separate events which must occur before entry of judgment is complete. First, the clerk must receive an order from the trial judge for the entry of judgment. Second, the judgment must be filed. Third, the clerk must mail notice of filing to all parties. *Darcy v. Osborne*, 101 N.C. App. 546, 400 S.E.2d 95 (1991).

Contrary Direction. — An instruction by the court that the prevailing party's attorney is to draft the order is a contrary direction. Therefore, because of the trial court's contrary direction, the automatic entry provisions of paragraph one of this rule do not operate to determine when entry of judgment occurred. *In re Hayes*, 106 N.C. App. 652, 418 S.E.2d 304 (1992).

It is essential that the notation of entry of judgment include at least the names of the parties, the prevailing party, the relief awarded, and the date the verdict was returned. The notation here lacks these specifics and is therefore insufficient to constitute entry of judgment under Rule 58. *Reed v. Abrahamson*, 331 N.C. 249, 415 S.E.2d 549 (1992).

Inadequate Notation. — In order to make a notation of "such verdict" as was returned in this case, the clerk had to specify more than the mere words "jury verdict." An adequate notation would have reflected much of the information on the actual jury verdict form, including, at minimum, the names of the parties, the prevailing party, the relief awarded, and the date the verdict was

returned. *Reed v. Abrahamson*, 331 N.C. 249, 415 S.E.2d 549 (1992).

Announcement in Open Court Is Not Entry of Judgment. — Announcement of judgment in open court merely constitutes the rendition of judgment, not its entry; the court of appeals has no authority to hear an appeal where there has been no entry of judgment. *In re Estate of Walker*, 113 N.C. App. 419, 438 S.E.2d 426 (1994).

Judgment Deemed Entered. — Where the trial judge announced his ruling in open court, which ruling was noted without instruction by the court, in the minutes by the clerk of court, in early April, and where the trial judge signed the written order that had been drafted by respondent's counsel at the end of the month, the order was deemed entered when the judge signed the written order. *Cobb v. Rocky Mount Bd. of Educ.*, 102 N.C. App. 681, 403 S.E.2d 538 (1991), *aff'd*, 331 N.C. 280, 415 S.E.2d 554 (1992).

Appeal Dismissed in Absence of Record of Notice. — Where a judgment was prepared and filed in this case but there was no evidence in the record on appeal that notice of filing was mailed to the parties and the judgment does not exhibit a time of mailing constituting prima facie evidence of mailing notice, judgment was not properly entered and appeal was dismissed for lack of jurisdiction. *Darcy v. Osborne*, 101 N.C. App. 546, 400 S.E.2d 95 (1991).

Judgment Incomplete for Purposes of Appeal Until Entry. — Not only does the trial court have the authority to subsequently enter a written judgment which conforms to its rendered

judgment, entry of judgment by the trial court is the event which vests jurisdiction in the appellate court, and the judgment is not complete for the purpose of appeal until its entry. In accord with 1993 Cumulative Supplement. In re Estate of Walker, 113 N.C. App. 419, 438 S.E.2d 426 (1994).

Notice of appeal given after the general terms of the judgment are announced in open court is, alone, not sufficient to vest jurisdiction in the appellate court. Searles v. Searles, 100 N.C. App. 723, 398 S.E.2d 55 (1990).

Where the jury announced its verdict in open court, it "rendered judgment" according to § 1A-1, Rule 3(a) and this rule, and oral notice of appeal was a proper procedure. Stimpson Hosiery Mills, Inc. v. Pam Trading Corp., 98 N.C. App. 543, 392 S.E.2d 128 (1990).

Factors in Analysis of Whether an Entry of Judgment Has Occurred. — The language of this rule clearly establishes that entry of judgment occurs when the clerk makes some notation in the minutes. In cases where the procedures used do not fit within the express provisions of the rule or where there is no evidence to indicate when or whether such notation was made, the spirit and purpose of the rule should determine when entry of judgment occurs. Relevant factors in this analysis are: (1) an easily identifiable point at which entry occurred, such that (2) the parties have fair notice of the court's judgment and the time thereof, and that (3) the matters for adjudication have been finally and completely resolved so that the case is suitable for appellate review. Stachlowski v. Stach, 328 N.C. 276, 401 S.E.2d 638 (1991).

Interrelationship Between Rules. — The importance of finality to the timing of entry of judgment is apparent more from the interrelationship between § 1A-1, Rule 54 and this rule than from the express language of this rule itself. The principal concern regarding finality is that all matters for determination be resolved. Stachlowski v. Stach, 328 N.C. 276, 401 S.E.2d 638 (1991).

Rendering of Judgment Held Not Entry of Judgment. — In a custody case, where the trial court announced in open court that the previous decree would receive full faith and credit and custody would not change, the court rendered judgment that day on the custody issue, but the court did not enter judgment, as the court directed counsel for

defendant to draw the order and the parties continued to negotiate on visitation so the rendering of judgment did not constitute entry of judgment. Stachlowski v. Stach, 328 N.C. 276, 401 S.E.2d 638 (1991).

Entry of judgment occurred when the trial court adopted and signed the proposed judgment submitted by plaintiff's counsel, not when the jury returned its verdict and the assistant clerk wrote "jury verdict" on the court calendar. Reed v. Abrahamson, 331 N.C. 249, 415 S.E.2d 549 (1992).

Adoption of Draft Order and Proposed Findings. — In a custody case, where trial court directed counsel for defendant to draft an order reflecting its decision, this order required findings of fact supporting the court's conclusion that there had been no material change of circumstances warranting a modification of the custody order. Fair notice concerns would dictate that entry of judgment occurred when the court adopted the draft order and proposed findings. Stachlowski v. Stach, 328 N.C. 276, 401 S.E.2d 638 (1991).

Each of the three paragraphs in this rule declares that entry of judgment occurs when the clerk makes some notation in the minutes. Stachlowski v. Stach, 328 N.C. 276, 401 S.E.2d 638 (1991).

In cases where entry of judgment cannot be determined from the express language of this rule, fair notice concerns indicate that "entry" occurs only after draft orders or judgments are submitted to and adopted by the court. Stachlowski v. Stach, 328 N.C. 276, 401 S.E.2d 638 (1991).

Entry of Judgment in a Divorce Action. — Because the pronouncement of divorce judgment was not entered within the explicit meaning of this Rule, and judgment can be entered only after the requisite findings of fact have been adopted in a divorce action under § 50-10, entry of judgment of absolute divorce did not occur until counsel submitted the judgment to the court and the court signed the judgment. Bumgardner v. Bumgardner, 113 N.C. App. 314, 438 S.E.2d 471 (1994).

Stated in Bunting v. Bunting, 100 N.C. App. 294, 395 S.E.2d 713 (1990); Saieed v. Bradshaw, 110 N.C. App. 855, 431 S.E.2d 233 (1993).

Cited in Custom Molders, Inc. v. Roper Corp., 101 N.C. App. 606, 401

S.E.2d 96 (1991); *Smith v. Gupton*, 110 N.C. App. 482, 429 S.E.2d 737 (1993).

Rule 59. New trials; amendment of judgments.

CASE NOTES

- I. In General.
- II. Time for Serving Motions and Affidavits.
- III. Altering or Amending Judgments.

I. IN GENERAL.

Discretion of Court as to Motion, etc. —

A motion for a new trial on the grounds of grossly inadequate or excessive damages under this rule is within the sound discretion of the trial court and may be reversed on appeal only when an abuse of discretion is clearly established. *Wilkinson v. Cruz*, 100 N.C. App. 420, 396 S.E.2d 811 (1990).

Trial judge has discretionary power to set aside an award, etc. —

In accord with the main volume. See *Maintenance Equip. Co. v. Godley Bldrs.*, 107 N.C. App. 343, 420 S.E.2d 199 (1992).

Remand for New Trial on Damage Issues. — Where the trial judge remarked that the maximum amount of damages that could have been available under the evidence presented was \$45,000, but he only remitted the award to \$60,000, which was still excessive under the evidence presented and constituted a manifest abuse of discretion, a remand for a new trial on the issue of damages was required. *Munie v. Tangle Oaks Corp.*, 109 N.C. App. 336, 427 S.E.2d 149 (1993).

Where the evidence showed that defendants were not misled by plaintiff about its possession of a certificate of authority to transact business in North Carolina, defendants' failure to raise the issue of plaintiff's authority to transact business in North Carolina in a motion prior to trial, as required by § 55-15-02(a), precluded it from doing so in a motion after trial. *Spivey & Self, Inc. v. Highview Farms, Inc.*, 110 N.C. App. 719, 431 S.E.2d 535, cert. denied, 334 N.C. 623, 435 S.E.2d 342 (1993).

Punitive Damages Held Not Excessive. — Where plaintiff clearly presented sufficient evidence to prove he was entitled to an award of punitive damages, upon a strict review of the record it could not be said as a matter of

law that the trial court erred in denying defendant's motion for a new trial on the grounds of excessive punitive damages. *State v. Morrell*, 108 N.C. App. 465, 424 S.E.2d 147, appeal dismissed, 333 N.C. 463, 427 S.E.2d 626 (1993).

No Abuse of Discretion Found. — No abuse of discretion was found where a jury awarded \$225,000.00 against an insurance company for bad faith refusal to settle. *Lovell v. Nationwide Mut. Ins. Co.*, 108 N.C. App. 416, 424 S.E.2d 181, aff'd in part; discretionary review improvidently granted in part, 334 N.C. 682, 435 S.E.2d 71 (1993).

Notice of appeal from denial of a motion to set aside a judgment which does not also specifically appeal the underlying judgment does not properly present the underlying judgment for review. *Von Ramm v. Von Ramm*, 99 N.C. App. 153, 392 S.E.2d 422 (1990).

Applied in *Burgess v. Vestal*, 99 N.C. App. 545, 393 S.E.2d 324 (1990); *Pate v. Eastern Insulation Serv. of New Bern, Inc.*, 101 N.C. App. 415, 399 S.E.2d 338 (1991); *Mickens v. Robinson*, 103 N.C. App. 52, 404 S.E.2d 359 (1991); *Beaver v. Hampton*, 106 N.C. App. 172, 416 S.E.2d 8 (1992); *Scott v. Scott*, 106 N.C. App. 379, 416 S.E.2d 583 (1992); *Perry-Griffin Found. v. Proctor*, 107 N.C. App. 528, 421 S.E.2d 186 (1992); *Jones ex rel. Jones v. Hughes*, 110 N.C. App. 262, 429 S.E.2d 399 (1993); *Heart of Valley Motel, Inc. v. Edwards*, 111 N.C. App. 896, 433 S.E.2d 466 (1993).

Cited in *Schall v. Jennings*, 99 N.C. App. 343, 393 S.E.2d 130 (1990); *First Am. Bank v. Carley Capital Group*, 99 N.C. App. 667, 394 S.E.2d 237 (1990); *Daum ex rel. Henderson v. Lorick Enters., Inc.*, 105 N.C. App. 428, 413 S.E.2d 559 (1992); *McClain v. Otis Elevator Co.*, 106 N.C. App. 45, 415 S.E.2d 78 (1992); *Mabry v. Nationwide Mut. Fire Ins. Co.*, 108 N.C. App. 37, 422 S.E.2d 322 (1992); *Plummer v. Kearney*, 108 N.C. App. 310, 423 S.E.2d 526 (1992); *Harrison v. Edison Bros. Apparel Stores*,

814 F. Supp. 457 (M.D.N.C. 1993); Nations v. Nations, 111 N.C. App. 211, 431 S.E.2d 852 (1993); Giles ex rel. Giles v. Smith, 112 N.C. App. 508, 435 S.E.2d 832 (1993); Tate v. Christy, 114 N.C. App. 45, 440 S.E.2d 858 (1994); Wyatt v. Hollifield, 114 N.C. App. 352, 442 S.E.2d 149 (1994).

II. TIME FOR SERVING MOTIONS AND AFFIDAVITS.

Defendant's Motion Held Un- timely. — Where, by the express terms of the parties' divorce agreement, defendant had at least constructive knowledge that one of plaintiff's possible alternatives to recover support payments included foreclosure on defendant's prop-

erty mentioned in the agreement, there was no merit in defendant's contention that this constituted newly discovered evidence which by due diligence he could not have discovered in time to move for a new trial under section (b) of this Rule. Lang v. Lang, 108 N.C. App. 440, 424 S.E.2d 190 (1993).

III. ALTERING OR AMENDING JUDGMENTS.

Amendment upon Motion of the Court. — A trial court has the power to amend its judgment on its own motion within the ten-day period provided by section (e) of this rule. Fox v. Fox, 103 N.C. App. 13, 404 S.E.2d 354 (1991).

Rule 60. Relief from judgment or order.

CASE NOTES

- I. In General.
- II. Relief under Section (a).
- III. Relief under Section (b).
 - A. In General.
 - B. Mistake, Inadvertence, Surprise and Excusable Neglect.
 - 1. In General.
 - 2. Relief Held Proper.
 - 3. Relief Held Improper.
 - E. Other Reasons Justifying Relief under Subsection (b)(6).
 - F. Void Judgments.

I. IN GENERAL.

Claim That Judgment Is Defective Not Permitted After Accepting Its Benefits. — After petitioning the court to enter a default judgment, plaintiff relied upon its validity and force thrice — by executing on it; by retaining the money collected by execution; and by suing defendant in a separate action for future rents. The law does not permit a party to claim that a judgment is defective after relying upon its validity and accepting its benefits. Kimzey Winston-Salem, Inc. v. Jester, 103 N.C. App. 77, 404 S.E.2d 176, cert. denied, 329 N.C. 497, 407 S.E.2d 534 (1991).

Applied in Pheasant v. McKibben, 100 N.C. App. 379, 396 S.E.2d 333 (1990); Carter v. Carter, 102 N.C. App. 440, 402 S.E.2d 469 (1991); Jackson v. Jackson, 102 N.C. App. 574, 402 S.E.2d 869 (1991); State ex rel. Blossom v. Murray, 103 N.C. App. 653, 406 S.E.2d 302 (1991); Faucette v. Dickerson, 103 N.C. App. 620, 406 S.E.2d 602 (1991); Hoolapa v. Hoolapa, 105 N.C. App. 230,

412 S.E.2d 112 (1992); Loftis v. Reynolds, 105 N.C. App. 697, 414 S.E.2d 378 (1992); John Henry Spainhour & Sons Grading Co. v. Carolina E.E. Homes, Inc., 109 N.C. App. 174, 426 S.E.2d 728 (1993); Holloway v. Wachovia Bank & Trust Co., 109 N.C. App. 403, 428 S.E.2d 453 (1993); Dobos v. Dobos, 111 N.C. App. 222, 431 S.E.2d 861 (1993); Bumgardner v. Bumgardner, 113 N.C. App. 314, 438 S.E.2d 471 (1994); Jenkins v. Middleton, 114 N.C. App. 799, 443 S.E.2d 110 (1994).

Quoted in Waldrop v. Young, 104 N.C. App. 294, 408 S.E.2d 883 (1991).

Cited in Von Ramm v. Von Ramm, 99 N.C. App. 153, 392 S.E.2d 422 (1990); Yates Constr. Co. v. Greenleaf Corp., 99 N.C. App. 489, 393 S.E.2d 563 (1990); Hill v. Hanes Corp., 102 N.C. App. 46, 401 S.E.2d 768 (1991); Metts v. Piver, 102 N.C. App. 98, 401 S.E.2d 407 (1991); Patrick v. Ronald Williams, Professional Ass'n, 102 N.C. App. 355, 402 S.E.2d 452 (1991); In re P.E.P., 329 N.C. 692, 407 S.E.2d 505 (1991); Scott v. Scott, 106

N.C. App. 379, 416 S.E.2d 583 (1992); *Foy v. Hunter*, 106 N.C. App. 614, 418 S.E.2d 299 (1992); *In re Hayes*, 106 N.C. App. 652, 418 S.E.2d 304 (1992); *Perry-Griffin Found. v. Proctor*, 107 N.C. App. 528, 421 S.E.2d 186 (1992); *Smith v. Gupton*, 110 N.C. App. 482, 429 S.E.2d 737 (1993); *Smith v. Smith*, 334 N.C. 81, 431 S.E.2d 196 (1993); *Berkeley Fed. Sav. & Loan Ass'n v. Terra Del Sol, Inc.*, 111 N.C. App. 692, 433 S.E.2d 449 (1993); *Bynum v. Frederickson Motor Express Corp.*, 112 N.C. App. 125, 434 S.E.2d 241 (1993); *Hooper v. Pizzagalli Constr. Co.*, 112 N.C. App. 400, 436 S.E.2d 145 (1993); *Bell Atl. Tricon Leasing Corp. v. Johnnie's Garbage Serv., Inc.*, 113 N.C. App. 476, 439 S.E.2d 221 (1994); *Wyatt v. Hollifield*, 114 N.C. App. 352, 442 S.E.2d 149 (1994).

II. RELIEF UNDER SECTION (a).

Amended order made substantive changes in the original order and was not an attempt to correct clerical errors; therefore, the amended order was hereby vacated as outside the authority of subsection (a) and the original order remained in full force and effect. *Buncombe County ex rel. Child Support Enforcement Agency ex rel. Andres v. Newburn*, 111 N.C. App. 822, 433 S.E.2d 782 (1993).

By changing the incorrect date of entry of judgment to a date other than the actual date judgment was entered, the trial court improperly altered the substantive rights of the parties by extending the period in which the parties could file a timely notice of appeal; this rule does not vest the trial court with such authority. *Food Serv. Specialists v. Atlas Restaurant Mgt., Inc.*, 111 N.C. App. 257, 431 S.E.2d 878 (1993).

III. RELIEF UNDER SECTION (b).

A. In General.

The purpose of subsection (b) of this rule is to strike a proper balance between the conflicting principles of finality and relief from unjust judgments. Generally, the rule is liberally construed. *Carter v. Clowers*, 102 N.C. App. 247, 401 S.E.2d 662 (1991).

To proceed under subsection (b) of this rule requires an initial determination of whether a notice of dismissal constitutes a "judgment, order or proceeding." *Carter v. Clowers*, 102 N.C. App. 247, 401 S.E.2d 662 (1991).

Amendment of Voluntary Dismissal.

sal. — A voluntary dismissal under § 1A-1, Rule 41(a)(1) can be amended pursuant to section (b) of this rule. *Newberry Metal Masters Fabricators, Inc. v. Mitek Indus., Inc.*, 333 N.C. 250, 424 S.E.2d 383 (1993).

When Consent Judgment May Be Changed, etc. —

A consent judgment incorporates the bargained agreement of the parties. Such a judgment can only be attacked on limited grounds. The party attacking the judgment must properly allege and prove that consent was not in fact given, or that it was obtained by mutual mistake or fraud. *Stevenson v. Stevenson*, 100 N.C. App. 750, 398 S.E.2d 334 (1990).

A contract may be avoided based on mutual mistake where the mistake is common to both parties and because of it each has done what neither intended. A unilateral mistake, unaccompanied by fraud, imposition, or like circumstances, is not sufficient to avoid a contract. These contract principles apply to consent judgments. *Stevenson v. Stevenson*, 100 N.C. App. 750, 398 S.E.2d 334 (1990).

Absent a showing of fraud, mutual mistake or a lack of consent, attacks on consent judgments are controlled by Rule 60(b)(6). *Thacker v. Thacker*, 107 N.C. App. 479, 420 S.E.2d 479, cert. denied, 332 N.C. 672, 424 S.E.2d 407 (1992).

Delay Held Unreasonable. — Trial court did not abuse its discretion in concluding that delay of one year in filing motion for relief under section (b) of this rule was unreasonable and in denying the motion. *Brown v. Windhom*, 104 N.C. App. 219, 408 S.E.2d 536 (1991).

Appellate review of a motion under section (b), etc. —

In accord with first paragraph in the main volume. See *Gallbronner v. Mason*, 101 N.C. App. 362, 399 S.E.2d 139, appeal dismissed, 333 N.C. 167, 399 S.E.2d 139 (1992).

In accord with second paragraph in the main volume. See *In re Finnican*, 104 N.C. App. 157, 408 S.E.2d 742 (1991).

When Court Fails to Make Findings of Fact. — Where the trial court does not make findings of fact in its order denying the motion to set aside the judgment, the question on appeal is whether, on the evidence before it, the court could have made findings of fact sufficient to support its legal conclusion.

Grant v. Cox, 106 N.C. App. 122, 415 S.E.2d 378 (1992).

Court's Miscalculation of Ability to Pay Alimony Arrearages Held Error.

— Where the trial court understated defendant's monthly expenses by approximately \$500.00 per month and failed to include that amount in its calculation of the amount of defendant's present ability to pay alimony arrearages and prospective alimony, while this miscalculation may have had no effect on the trial court's order of specific performance, it may have had an effect on the amount defendant can reasonably afford to pay plaintiff on a monthly basis; the trial court's miscalculation in this situation was of a substantial nature and was a prejudicial error. *Edwards v. Edwards*, 102 N.C. App. 706, 403 S.E.2d 530, cert. denied, 329 N.C. 787, 408 S.E.2d 518 (1991).

Where defendants contended that a mistake was mutual in that both parties settling a wrongful death claim agreed to purchase an annuity for \$300,000.00 and that both parties were mistaken as to the actual future payments that the decedent's child would receive from the annuity based on a present value of \$300,000.00, as based on incorrect figures received from the annuity company, but where the settlement agreement made no representation as to the cost of the annuity to defendants, and the agreement did not set forth a present value for the settlement, but rather simply set forth the payments to be made by the defendants to decedent's wife and child, the defendants' allegation that the mistake as to the present value of the annuity was mutual was not evident in the settlement agreement. *Goodwin v. Cashwell*, 102 N.C. App. 275, 401 S.E.2d 840 (1991).

B. Mistake, Inadvertence, Surprise and Excusable Neglect.

1. In General.

Final Adjudication. — Once the one-year period for refiling an action has elapsed and the action can no longer be resurrected, the voluntary dismissal acts as a final adjudication for purposes of section (b). *Robinson v. General Mills Restaurants, Inc.*, 110 N.C. App. 633, 430 S.E.2d 696, cert. granted, 334 N.C. 623, 435 S.E.2d 340, 341 (1993).

Relief Possible Without Motion. — [A]lthough this rule says that the court is to act "on motion," it does not deprive

the court of the power to act in the interest of justice in an unusual case where its attention has been directed to the necessity for relief by means other than a motion. *Carter v. Clowers*, 102 N.C. App. 247, 401 S.E.2d 662 (1991).

Findings of Fact. — Under section (b), the trial court is not required to make findings of fact unless requested to do so by a party. *Nations v. Nations*, 111 N.C. App. 211, 431 S.E.2d 852 (1993).

Waiver of Errors. — Errors of law alleged to have been committed by the trial court in entering the equitable distribution judgment were issues which could have been raised in the first appeal to the Court of Appeals; therefore, the trial court did not abuse its discretion in denying section (b) motion, as the record could support no other conclusion. *Nations v. Nations*, 111 N.C. App. 211, 431 S.E.2d 852 (1993).

2. Relief Held Proper.

Failure to Maintain Agent for Service of Process. — Where defendant corporation failed for more than eight years to maintain a registered agent in North Carolina to receive service of process, and failed, for over eight years, to notify the Secretary of State that its address had changed, there existed competent evidence in the record of inexcusable neglect that led to the entry a default judgment which could not be set aside. *Patridge v. Associated Cleaning Consultants & Servs., Inc.*, 108 N.C. App. 625, 424 S.E.2d 664 (1993).

3. Relief Held Improper.

Consent Order. — Motion under section (b)(6) of this rule should have been denied where defendant altered the agreement from what was agreed upon at trial, as each side apparently did during several redrafts. There was no finding or evidence which would lead to a conclusion that this was inadvertent; therefore, any mistake was not mutual, and a consent order incorporating the agreement could not be modified. *Stevenson v. Stevenson*, 100 N.C. App. 750, 398 S.E.2d 334 (1990).

A finding that plaintiff received a greater percentage of the marital assets pursuant to the consent judgment would not otherwise be sufficient to render the agreement invalid, and defendant could not invoke the broad language of subdivision (b)(6) of this rule simply to obtain relief to which she was otherwise not entitled. *Thacker v. Thacker*, 107 N.C.

App. 479, 420 S.E.2d 479, cert. denied, 332 N.C. 672, 424 S.E.2d 407 (1992).

Subdivision (b)(6) of this rule is not a catch-all rule; in order to be entitled to relief thereunder, the movant must show that (1) extraordinary circumstances exist and that (2) justice demands such relief. *Goodwin v. Cashwell*, 102 N.C. App. 275, 401 S.E.2d 840 (1991).

Failure to Attend Proceedings After Insurance Carrier Refused to Defend. — Where defendants were well aware that their insurance carrier refused to represent them, and counsel for plaintiff waited three months before moving for default and also sent defendants a letter stating his intention to seek default if defendants continued to fail to respond, there was sufficient time to protect their interests; accordingly, trial court's refusal to grant defendants relief from judgment for excusable neglect was not an abuse of discretion. *Hayes v. Evergo Tel. Co. Ltd.*, 100 N.C. App. 474, 397 S.E.2d 325 (1990).

An order reopening and enlarging a default judgment was erroneous because, by deciding to obtain a final judgment for the sum certain that was owed when the default judgment was entered, rather than to have the damages determined later by a trial, plaintiff waived any right it might have had to obtain judgment for a larger amount. *Kimzey Winston-Salem, Inc. v. Jester*, 103 N.C. App. 77, 404 S.E.2d 176, cert. denied, 329 N.C. 497, 407 S.E.2d 534 (1991).

Plaintiff's affidavits did not support the court's finding that judgment was entered as a result of mistake, inadvertence or excusable neglect, as the inadvertence, mistake, or neglect that they showed were of a kind that the law does not excuse. All the affidavits showed, when sifted down, was that in signing the court papers which enabled default judgment to be entered plaintiff's treasurer and counsel were unaware that they had sued for future rents — a matter that they could have known through the exercise of due diligence and reasonable care, and that they were required to know by § 1A-1, Rule 11 of our civil procedure rules. *Kimzey Winston-Salem, Inc. v. Jester*, 103 N.C. App. 77, 404 S.E.2d 176, cert. denied, 329 N.C. 497, 407 S.E.2d 534 (1991).

E. Other Reasons Justifying Relief under Subsection (b)(6).

Subsection (b)(6) of this section is equitable in nature and authorizes the trial judge to exercise his discretion in granting or withholding the relief sought. *State ex rel. Envtl. Mgt. Comm'n v. House of Raeford Farms, Inc.*, 101 N.C. App. 433, 400 S.E.2d 107 (1991), discretionary review denied, 328 N.C. 576, 403 S.E.2d 521 (1991).

Subdivision (b)(6) serves as a "grand reservoir of equitable power" by which a court may grant relief from a judgment whenever extraordinary circumstances exist and there is a showing that justice demands it. *Dollar v. Tapp*, 103 N.C. App. 162, 404 S.E.2d 482 (1991).

Subdivision (b)(6) Not a "Catch-All" Rule. —

Although subsection (b)(6) of this rule has often been termed "a vast reservoir of equitable power," a court cannot set aside a judgment pursuant to this rule without a showing (1) that extraordinary circumstances exist, and (2) that justice demands relief. *Thacker v. Thacker*, 107 N.C. App. 479, 420 S.E.2d 479, cert. denied, 332 N.C. 672, 424 S.E.2d 407 (1992).

Two-Pronged Test. — The setting aside of a judgment pursuant to subsection (b)(6) of this rule should only take place where (i) extraordinary circumstances exist and (ii) there is a showing that justice demands it. This test is two-pronged, and relief should be forthcoming only where both requisites exist. In addition to these requirements, the movant must also show that he has a meritorious defense. *State ex rel. Envtl. Mgt. Comm'n v. House of Raeford Farms, Inc.*, 101 N.C. App. 433, 400 S.E.2d 107 (1991), discretionary review denied, 328 N.C. 576, 403 S.E.2d 521 (1991).

Failure to Obtain Personal Jurisdiction Over Defendant. — Motion to set aside the consent judgment, although made more than six years after its entry, was based on the argument that the trial court did not have personal jurisdiction over defendant. Because a judgment entered without personal jurisdiction over a party is void, defendant's motion was not untimely because it was undisputed that defendant neither accepted service of process nor was served with process. *Nye, Mitchell, Javis & Bugg v. Oates*, 109 N.C. App. 289, 426 S.E.2d 291 (1993).

Where the record supported the

trial court's finding that there was no evidence to show that plaintiff's attorney had actual knowledge of an address where defendant could be served, substituted service on the Secretary of State was effective, and trial court did not err in denying defendant's motion to set aside the judgment on that ground pursuant to subdivision (b)(4) of this rule. *Patridge v. Associated Cleaning Consultants & Servs., Inc.*, 108 N.C. App. 625, 424 S.E.2d 664 (1993).

Motion to Amend Consent Judgment Not Allowed. — Subsection (b)(6) of this rule permits motions for relief from judgments for "[a]ny other reason justifying relief from the operation of the judgment." However, where a request for relief pursuant to subsection (b)(6) of this rule was in reality a motion to amend the Consent Judgment and that result could not be achieved by a motion under subsection (b)(6). *State ex rel. Env'tl. Mgt. Comm'n v. House of Raeford Farms, Inc.*, 101 N.C. App. 433, 400 S.E.2d 107 (1991), discretionary review denied, 328 N.C. 576, 403 S.E.2d 521 (1991).

Failure to Perfect Appeal. — The Superior Court's appropriate dismissal of defendant's appeal on the grounds that defendant failed to perfect it barred any discussion of the merits of the exchange rate used in the judgment; accordingly, the trial court properly denied defendant's motion under subdivision (b)(6) of this rule. *Lang v. Lang*, 108 N.C. App. 440, 424 S.E.2d 190 (1993).

Where Department of Transportation (DOT) made no showing of extraordinary circumstances or that

justice required relief from the execution and order in aid of execution, the trial court erred by granting DOT such relief. *Able Outdoor, Inc. v. Harrelson*, 113 N.C. App. 483, 439 S.E.2d 245 (1994).

F. Void Judgments.

A judgment is void only when the issuing court has no jurisdiction over the parties or subject matter in question or has no authority to render the judgment entered. *Burton v. Blanton*, 107 N.C. App. 615, 421 S.E.2d 381 (1992).

A judgment is not void, etc. —

A judgment, if proper on its face, is not void. *Burton v. Blanton*, 107 N.C. App. 615, 421 S.E.2d 381 (1992).

Time for Attacking Void Judgment, etc. —

In accord with the main volume. See *In re Finnican*, 104 N.C. App. 157, 408 S.E.2d 742 (1991).

Lack of In Personam Jurisdiction.

— Judgment entered against defendant over which the court does not have in personam jurisdiction is void and subject to being set aside pursuant to subsection (b)(4) of this rule. *Hayes v. Evergo Tel. Co.*, 100 N.C. App. 474, 397 S.E.2d 325 (1990).

Motion Under Subsection (b)(4) Held Inappropriate. — Where the court had jurisdiction and authority to enter a contempt order, the order was not void, and therefore, a subsection (b)(4) motion was an inappropriate means to rectify the alleged error of failing to appoint counsel for defendant. *Vaughn v. Vaughn*, 99 N.C. App. 574, 393 S.E.2d 567 (1990).

Rule 61. Harmless error.

CASE NOTES

Introduction of Erroneous Instruction. — Trial court did not commit prejudicial error by presenting an allegedly erroneous view of the law regarding breach of fiduciary duty in its instruction to the jury by basing the instruction on a North Carolina case rather than on several Georgia cases cited in plaintiffs' brief because there was no substantial difference between the Georgia and

North Carolina cases regarding the treatment of minority stockholders in a close corporation. *Powell v. Omli*, 110 N.C. App. 336, 429 S.E.2d 774 (1993), cert. denied, 334 N.C. 621, 435 S.E.2d 338 (1993).

Applied in *Sheppard v. Zep Mfg. Co.*, 114 N.C. App. 25, 441 S.E.2d 161 (1994); *In re Ezzell*, 113 N.C. App. 388, 438 S.E.2d 482 (1994).

Rule 63. Disability of a judge.

CASE NOTES

Original Judge Need Not Have Become Incapacitated. — Trial court did not err in having their post-judgment motions ruled upon by another judge; this rule neither requires nor implies that before a different judge can rule on

post-trial motions, the judge who heard the case must have become incapacitated. *Borg-Warner Acceptance Corp. v. Johnston*, 107 N.C. App. 174, 419 S.E.2d 195 (1992), cert. denied, 333 N.C. 254, 424 S.E.2d 918 (1993).

ARTICLE 8.

Miscellaneous.

Rule 65. Injunctions.

CASE NOTES

I. In General.

II. Preliminary Injunctions.

I. IN GENERAL.

Applied in *Industrial Innovators, Inc. v. Myrick-White, Inc.*, 99 N.C. App. 42, 392 S.E.2d 425 (1990).

Quoted in *Barr-Mullin, Inc. v. Browning*, 108 N.C. App. 590, 424 S.E.2d 226 (1993).

Stated in *Kaplan v. Prolife Action League*, 111 N.C. App. 1, 431 S.E.2d 828 (1993).

II. PRELIMINARY INJUNCTIONS.

Verification of Complaint Not a Condition for Issuance. — Verification of a complaint is not a condition for issuance of a preliminary injunction under this rule. *Moore v. Wykle*, 107 N.C. App. 120, 419 S.E.2d 164 (1992), cert. denied, 332 N.C. 666, 424 S.E.2d 405 (1992).

Rule 68. Offer of judgment and disclaimer.

CASE NOTES

I. In General.

I. IN GENERAL.

Prevailing Parties. — Because the rationale behind this rule is to encourage a voluntary, mutual settlement, both parties may consider themselves prevailing parties. *Evans v. Full Circle Prods., Inc.*, 114 N.C. App. 777, 443 S.E.2d 108 (1994).

Interest and Other Costs Not Included. — Where the relevant portion of defendant's offer of judgment allowed judgment to be taken against them for "\$10,001.00 for all damages and attorney's fees taxable as costs, together with the remaining costs accrued"; use of the

language "together with" evidenced an intent to make an offer of judgment only as to the substantive claim and attorney fees, but not as to any other costs such as interest; therefore, construing the offer against defendants, as the drafters, a lump sum offer was not intended. *Aikens v. Ludlum*, 113 N.C. App. 823, 440 S.E.2d 319 (1994).

Taxing of Costs on Nonspecific Offer. — Trial court did not have authority under this rule to tax costs to the plaintiff where defendants made a nonspecific offer for both plaintiffs to take judgment against defendants for a total sum of \$25,000. When multiple plaintiffs in the

same complaint have independent claims for relief, an offer of judgment can be valid only if it is specific as to the offer made to each plaintiff; a party wishing to accept the offer should not be barred from doing so, and thus subject himself to penalties under this rule, just because the other party would not accept. *True v. T & W Textile Mach., Inc.*,

112 N.C. App. 358, 435 S.E.2d 551 (1993), cert. granted, 335 N.C. 555, 441 S.E.2d 134 (1994).
Cited in *Burgess v. Vestal*, 99 N.C. App. 545, 393 S.E.2d 324 (1990); *Patrick v. Ronald Williams, Professional Ass'n*, 102 N.C. App. 355, 402 S.E.2d 452 (1991).

Rule 68.1. Confession of judgment.

CASE NOTES

I. In General.

I. IN GENERAL.

Imposition of restitution as a condition of probation is not a legal obligation equivalent to a civil judgment; therefore, in sentences imposed for § 14-100

convictions, that part of the judgment purporting to require defendant to sign confessions of judgment was vacated. *State v. Clemmons*, 111 N.C. App. 569, 433 S.E.2d 748 (1993).

Chapter 1B. Contribution.

ARTICLE 1.

Uniform Contribution among Tort-Feasors Act.

§ 1B-1. Right to contribution.

Legal Periodicals. —

For note discussing North Carolina's retention of its partial parent-child immunity doctrine, in light of *Lee v. Mowett Sales Co.*, 316 N.C. 489, 342 S.E.2d 882 (1986), and arguing for its abrogation, see 65 N.C.L. Rev. 1457 (1987).

For note, "The Release Provision of the Uniform Contribution Among Tort-Feasors Act Applies to Vicarious Liability in the Master-Servant Context — *Yates v. New South Pizza, Ltd.*," see 15 Campbell L. Rev. 55 (1992).

CASE NOTES

I. In General.

I. IN GENERAL.

Chapter Inapplicable in Contract Actions. — By its terms, this Chapter applies only in tort actions, not contract actions. *Duke Univ. v. St. Paul Mercury Ins. Co.*, 95 N.C. App. 663, 384 S.E.2d 36 (1989).

The right to contribution is statutory and is applicable only between joint tort-feasors. *Roseboro Ford, Inc. v. Bass*, 77 N.C. App. 363, 335 S.E.2d 214 (1985).

No Right to Contribution from One Not a Joint Tort-Feasor. —

There is no right to contribution from one who is not a joint tort-feasor. *Holland v. Edgerton*, 85 N.C. App. 567, 355 S.E.2d 514 (1987).

The right to contribution does not exist unless two or more parties are joint tort-feasors. *State Farm Mut. Auto. Ins. Co. v. Holland*, 324 N.C. 466, 380 S.E.2d 100 (1989).

Nor for Claim on Contract. — Under subsection (a) of this section, a defendant is entitled to contribution where he and one or more other persons are jointly or severally liable in tort. By the clear language of the statute, a defendant is not entitled to contribution for a claim against him in contract. *Holland v. Edgerton*, 85 N.C. App. 567, 355 S.E.2d 514 (1987).

Claim for relief, based on a breach of

implied warranty, gave rise to no right of contribution on the part of third party plaintiff, because it sounded in contract and not in tort. *Holland v. Edgerton*, 85 N.C. App. 567, 355 S.E.2d 514 (1987).

Contribution Not Available for Intentional Infliction of Mental Distress. — The language of subsection (c) of this section clearly excludes the possibility of contribution on any claim by plaintiffs for intentional infliction of mental distress. *Holland v. Edgerton*, 85 N.C. App. 567, 355 S.E.2d 514 (1987).

Who Are Joint Tort-Feasors. — Two or more parties are joint tort-feasors when their negligent or wrongful acts are united in time or circumstance such that the two acts constitute one transaction or when two separate acts concur in point of time and place to cause a single injury. *State Farm Mut. Auto. Ins. Co. v. Holland*, 324 N.C. 466, 380 S.E.2d 100 (1989).

If independent wrongful acts of two or more persons unite in producing a single indivisible injury, the parties are joint tort-feasors within the meaning of the law. *Cox v. Robert C. Rhein Interest, Inc.*, 100 N.C. App. 584, 397 S.E.2d 358 (1990).

Suit Against One or More Joint Tort-Feasors by Personal Representative. — The personal representative of a person killed by the negligence of two joint tort-feasors may, at his election,

sue one or both of the tort-feasors. If he sues both and the jury finds them to be joint tort-feasors, the resulting judgment is joint and several and the party paying more than his pro rata share of the judgment is entitled to contribution from the other. *State Farm Mut. Auto. Ins. Co. v. Holland*, 324 N.C. 466, 380 S.E.2d 100 (1989).

Joinder of Other Tort-Feasors by Defendant. — Where plaintiff elects to sue only one of several joint tort-feasors, the original defendant may have others joined as additional or third party defendants. *State Farm Mut. Auto. Ins. Co. v. Holland*, 324 N.C. 466, 380 S.E.2d 100 (1989).

Separate Action by Defendant Against Other Tort-Feasor. — Where one of two joint tort-feasors is not made a party to the original action, either by the plaintiff or the original defendant, the original defendant may nevertheless, by separate action, seek contribution from the other tort-feasor. In such a case he must establish, not only that a judgment has been entered against him, but that the other party is in fact a joint tort-feasor, that is, that the other party is liable jointly with the original defendant to the plaintiff for damages. *State Farm Mut. Auto. Ins. Co. v. Holland*, 324 N.C. 466, 380 S.E.2d 100 (1989).

The burden is on the tort-feasor seeking contribution to show that the right exists, and to allege facts which show liability to the injured party as well as a right to contribution. *State Farm Mut. Auto. Ins. Co. v. Holland*, 324 N.C. 466, 380 S.E.2d 100 (1989).

Collateral Estoppel Not Available to Show Joint and Several Liability of One Not Made Defendant in Action. — Where, after wrongful death action in which mother was neither named as a defendant nor named as a third party defendant, and in which insured was found to have caused the death of child in a car accident, insurer sought contribution from mother for half of the money paid to the child's estate, the doctrine of collateral estoppel was not available to the insurer to show mother's joint and several liability to the estate of the child; since mother was not a party to the wrongful death claim and was not made a third party defendant for the purpose of contribution, neither her liability to the estate of child nor her liability to insurer as a joint tort-feasor was established by the judgment in the original action. *State Farm Mut. Auto. Ins.*

Co. v. Holland, 324 N.C. 466, 380 S.E.2d 100 (1989).

To permit an original defendant against whom a judgment is entered in a claim for the wrongful death of a child to collect one-half of the judgment from the parent, based solely on determination of parent's negligence for the purpose of assessing damages against defendant, would effectively remove any need to make the parent a third party defendant. The practical effect of such a holding would be to prevent the parent's insurer from having an opportunity to defend a claim against the parent. *State Farm Mut. Auto. Ins. Co. v. Holland*, 324 N.C. 466, 380 S.E.2d 100 (1989).

Third-party plaintiff had an affirmative burden to show that he met the requirements of subsection (d) of this section, and he failed to meet this burden where he did not introduce evidence of a release that he claimed he obtained from the injured party, nor show that third-party defendant's liability to the injured party had been extinguished. *King v. Humphrey*, 88 N.C. App. 143, 362 S.E.2d 614 (1987).

Trial court erred in not applying § 1B-4 where, in their complaint, plaintiffs treated defendants as joint tort-feasors and sought relief from flood damage caused by mud and silt runoff from all defendants' properties, and evidence at trial revealed only a single indivisible injury, the flooding of plaintiffs' property, and until appeal plaintiffs did not attempt to allocate their injury among defendants. *Cox v. Robert C. Rhein Interest, Inc.*, 100 N.C. App. 584, 397 S.E.2d 358 (1990).

For defendant to be entitled to verdict reduction in the amount of a pretrial settlement between plaintiffs and two other defendants, it must not only appear that the three defendants are tort-feasors, but also that the negligence of all three defendants caused an indivisible injury. *Cox v. Robert C. Rhein Interest, Inc.*, 100 N.C. App. 584, 397 S.E.2d 358 (1990).

Although it appears that the legislature intended the phrase in subsection (f) of this section to mean "where one tort-feasor is entitled to indemnity from another tort-feasor," the language of the statute is simply "where one tort-feasor is entitled to indemnity from another." Since the term "another" as used in the statute is ambiguous, by applying principles of statutory construction to ascertain the legis-

lative will, and the title of the Act makes clear that the statute applies to "tort-feasors"; the context of the legislation indicates that it is concerned only with the apportionment of loss as between tort-feasors, and the Act should not be read to speak to apportionment of loss by contract between a tort-feasor and a third party. *Yates v. New S. Pizza, Ltd.*, 102 N.C. App. 66, 401 S.E.2d 380 (1991), *rev'd* on other grounds, 330 N.C. 790, 412 S.E.2d 666, *reh'g* denied, 331 N.C. 292, 417 S.E.2d 73 (1992).

Applied in *United States v. Ward*, 618 F. Supp. 884 (E.D.N.C. 1985); *Yates v. New S. Pizza, Ltd.*, 330 N.C. 790, 412 S.E.2d 666 (1992).

Quoted in *Seafare Corp. v. Trenor Corp.*, 88 N.C. App. 404, 363 S.E.2d 643 (1988).

Cited in *Selective Ins. Co. v. NCNB Nat'l Bank*, 324 N.C. 560, 380 S.E.2d 521 (1989); *Sorrells v. M.Y.B. Hospital-ity Ventures*, 108 N.C. App. 668, 424 S.E.2d 676 (1993).

§ 1B-3. Enforcement.

CASE NOTES

Subsection (e) codifies the common-law rule applicable to joint tort-feasors. *Ipock v. Gilmore*, 73 N.C. App. 182, 326 S.E.2d 271, *cert. denied*, 314 N.C. 116, 332 S.E.2d 481 (1985), *aff'd*, 85 N.C. App. 70, 354 S.E.2d 315 (1987).

Party Entitled to One Satisfaction.

— Although an injured party may pursue and obtain judgments against all joint tort-feasors for a single injury, he may have only one satisfaction. *Ipock v. Gilmore*, 73 N.C. App. 182, 326 S.E.2d 271, *cert. denied*, 314 N.C. 116, 332 S.E.2d 481 (1985), *aff'd*, 85 N.C. App. 70, 354 S.E.2d 315 (1987).

Statute of Limitations. — Subdivision (d)(3) must be read to provide for a three-year statute of limitations for re-filing contribution claims. *Safety Mut. Cas. Corp. v. Spears*, 104 N.C. App. 467, 409 S.E.2d 736 (1991), *cert. granted*, 331 N.C. 118, 415 S.E.2d 200 (1992), petition withdrawn, 333 N.C. 346, 429 S.E.2d 552 (1993).

The legislature has failed to fix a time in subdivision (d)(3) for re-filing contribution claims in the situation where a party brings a claim for contribution that is voluntarily dismissed after settlement of the underlying claim. However, the legislature has provided that a three-year statute of limitations applies upon a liability created by statute, either state or federal, unless some other time is mentioned in the statute creating it. *Safety Mut. Cas. Corp. v. Spears*, 104 N.C. App. 467, 409 S.E.2d 736 (1991), *cert. granted*, 331 N.C. 118, 415 S.E.2d 200 (1992), petition withdrawn, 333 N.C. 346, 429 S.E.2d 552 (1993).

Collateral Estoppel Not Available to Show Joint and Several Liability of One Not Made Defendant in Ac-

tion. — Where, after wrongful death action in which mother was neither named as a defendant nor named as a third party defendant, and in which insured was found to have caused the death of child in a car accident, insurer sought contribution from mother for half of the money paid to the child's estate, the doctrine of collateral estoppel was not available to the insurer to show mother's joint and several liability to the estate of the child; since mother was not a party to the wrongful death claim and was not made a third party defendant for the purpose of contribution, neither her liability to the estate of child nor her liability to insurer as a joint tort-feasor was established by the judgment in the original action. *State Farm Mut. Auto. Ins. Co. v. Holland*, 324 N.C. 466, 380 S.E.2d 100 (1989).

Section 1B-4 Not Applicable Where Requirements of Subsection (e) Not Met. — Where plaintiff did not bring previous wrongful death action for death of his son on behalf of an injured minor or minor plaintiff as required by subsection (e) of this section, and consent judgment entered therein between himself and his wife, the defendant, did not specify that it was anything other than a judgment, § 1B-4 did not apply to the case which he subsequently brought against motorcycle dealer, manufacturer and credit company. Therefore, under subsection (e), the judgment entered therein was fully satisfied by the insurance company of plaintiff's wife, discharging defendants in the subsequent case from liability for the same injury or wrongful death. *Severance v. Ford Motor Co.*, 98 N.C. App. 330, 390 S.E.2d 704 (1990).

§ 1B-4. Release or covenant not to sue.

CASE NOTES

Chapter Inapplicable in Contract Actions. — By its terms, this Chapter applies only in tort actions, not contract actions. *Duke Univ. v. St. Paul Mercury Ins. Co.*, 95 N.C. App. 663, 384 S.E.2d 36 (1989).

Section Not Applicable Where Requirements of § 1B-3(e) Not Met. — Where plaintiff did not bring previous wrongful death action for death of his son on behalf of an injured minor or minor plaintiff as required by subsection (e) of this section, and consent judgment entered therein between himself and his wife, the defendant, did not specify that it was anything other than a judgment, § 1B-4 did not apply to the case which he subsequently brought against motorcycle dealer, manufacturer and credit company. Therefore, under subsection (e), the judgment entered therein was fully satisfied by the insurance company of plaintiff's wife, discharging defendants in the subsequent case from liability for the same injury or wrongful death. *Severance v. Ford Motor Co.*, 98 N.C. App. 330, 390 S.E.2d 704 (1990).

This section permits a tort-feasor to enter into a good faith settlement and release with an injured party and relieve himself of further liability to remaining joint tort-feasors for contribution. *Menard ex rel. Menard v. Johnson*, 105 N.C. App. 70, 411 S.E.2d 825 (1992).

One Recovery for Each Injury. — North Carolina recognizes the common law principle of "one recovery" for each injury, even where the legislature has authorized damages that are punitive in character. *Ferris v. Haymore*, 967 F.2d 946 (4th Cir. 1992).

Trial court erred in not applying

this section where, in their complaint, plaintiffs treated defendants as joint tort-feasors and sought relief from flood damage caused by mud and silt runoff from all defendants' properties, and evidence at trial revealed only single indivisible injury, the flooding of plaintiffs' property, and until appeal plaintiffs did not attempt to allocate their injury among defendants. *Cox v. Robert C. Rhein Interest, Inc.*, 100 N.C. App. 584, 397 S.E.2d 358 (1990).

A defendant who settles with a plaintiff and invokes this section to bar a cross claim for contribution from a co-defendant does not lose his rights to pursue his own cross claim or counterclaim against the same co-defendant for damages (personal and property) allegedly inflicted upon him by the co-defendant. *Menard ex rel. Menard v. Johnson*, 105 N.C. App. 70, 411 S.E.2d 825 (1992).

Claims for Injury or Damage Not Addressed. — The plain language of this section does not address cross claims or counterclaims for personal injury or property damage; this section only addresses the statutory right to contribution. *Menard ex rel. Menard v. Johnson*, 105 N.C. App. 70, 411 S.E.2d 825 (1992).

For defendant to be entitled to verdict reduction in the amount of a pretrial settlement between plaintiffs and two other defendants, it must not only appear that the three defendants are tort-feasors, but also that the negligence of all three defendants caused an indivisible injury. *Cox v. Robert C. Rhein Interest, Inc.*, 100 N.C. App. 584, 397 S.E.2d 358 (1990).

ARTICLE 2.

Judgment against Joint Obligors or Joint Tort-Feasors.

§ 1B-7. Payment of judgment by one of several.

CASE NOTES

Equitable Contribution. — Nothing on the face of this section, or in its history, indicates that the General Assembly intended to eliminate the right to seek equitable contribution. *Holcomb v. Holcomb*, 70 N.C. App. 471, 320 S.E.2d 12 (1984).

At no point did any prior version of the contribution statute, nor does the

modern version, expressly or impliedly eliminate the equitable contribution action. Rather, equitable contribution has continued as an independent action, separate from the summary proceedings set out in statute for preserving the judgment. *Holcomb v. Holcomb*, 70 N.C. App. 471, 320 S.E.2d 12 (1984).

Chapter 1C.

Enforcement of Judgments.

Article 18.

North Carolina Foreign Money Judgments Recognition Act.

Sec.

1C-1800. Short title.

1C-1801. Definitions.

1C-1802. Applicability of Article.

Sec.

1C-1803. Recognition and enforcement.

1C-1804. Grounds for nonrecognition.

1C-1805. Basis for personal jurisdiction.

1C-1806. Stay pending an appeal.

1C-1807. Situations not covered by Article.

1C-1808. Uniformity of interpretation.

ARTICLE 16.

Exempt Property.

§ 1C-1601. What property exempt; waiver; exceptions.

CASE NOTES

Subsection (c) Unconstitutional. — Subsection (c) of this section and § 1C-1603(e)(2), as they attempt to limit the claiming of constitutional exemptions to 20 days after notice to designate is served, are unconstitutional. *HFC v. Ellis*, 107 N.C. App. 262, 419 S.E.2d 592 (1992), *aff'd per curiam*, 333 N.C. 786, 429 S.E.2d 716 (1993).

Surplus Funds Arising From Foreclosure Sale. — A debtor has a property

interest in surplus funds arising from a foreclosure sale; consequently, the interest becomes property of the estate upon filing of a petition for bankruptcy and the debtor may claim exemption in it to the extent permitted by law. *In re Harris*, 139 Bankr. 386 (Bankr. E.D.N.C. 1992).

Applied in *In re Pinner*, 146 Bankr. 659 (Bankr. E.D.N.C. 1992).

§ 1C-1603. Procedure for setting aside exempt property.

CASE NOTES

Subdivision (e)(2) Unconstitutional. — Subsection (c) of § 1C-1601 and subdivision (e)(2) of this section, as they attempt to limit the claiming of constitutional exemptions to 20 days after notice to designate is served, are unconstitutional. *HFC v. Ellis*, 107 N.C. App. 262, 419 S.E.2d 592 (1992), *aff'd per curiam*, 333 N.C. 786, 429 S.E.2d 716 (1993).

Requirement of Notice. — Notice is required before each execution. A single notice before the first execution is not sufficient. *HFC v. Ellis*, 107 N.C. App. 262, 419 S.E.2d 592 (1992), *aff'd per curiam*, 333 N.C. 786, 429 S.E.2d 716 (1993).

Execution and Waiver. — This statute requires that no execution be issued until a Notice to Designate Exemptions has been served and any waiver applies only to the particular execution issued. *HFC v. Ellis*, 107 N.C. App. 262, 419 S.E.2d 592 (1992), *aff'd per curiam*, 333 N.C. 786, 429 S.E.2d 716 (1993).

Surplus Funds Arising From Foreclosure Sale. — A debtor has a property interest in surplus funds arising from a foreclosure sale; consequently, the interest becomes property of the estate upon filing of a petition for bankruptcy and the debtor may claim exemption in it to the extent permitted by law. *In re Harris*, 139 Bankr. 386 (Bankr. E.D.N.C. 1992).

§ 1C-1604. Effect of exemption.

CASE NOTES

Controlling Effect of 11 U.S.C. § 522(f). —

The provision of subsection (a) of this section limiting the homestead exemption to the duration of the debtor's ac-

tual residence in that place must not be applied in preference to the avoidance power of § 522(f) of the Bankruptcy Code. *Wachovia Bank & Trust Co. v. Opperman*, 943 F.2d 441 (4th Cir. 1991).

ARTICLE 17.

Uniform Enforcement of Foreign Judgments Act.

§ 1C-1701. Short title.

CASE NOTES

Authenticated Foreign Judgment.

— In an action to enforce a foreign judgment under this Article of the General Statutes, in the absence of any evidence from the judgment debtor, the introduction of a properly authenticated foreign judgment is entitled the foreign judgment to full faith and credit. *Lust v. Fountain of Life, Inc.*, 110 N.C. App. 298, 429 S.E.2d 435 (1993).

Presumption of Validity. — Once a judgment creditor was entitled to a presumption that an out of state judgment was entitled to full faith and credit, the

plaintiff was not required, as the defendants suggested, to bring forth evidence that none of the defenses available to defendants were valid; rather the defendants were required to bring forth evidence to rebut the presumption of validity, and, as the defendants offered no such evidence, the trial court correctly ordered that the plaintiff's motion to enforce the judgment be allowed and ordered that the out of state judgment be given full faith and credit. *Lust v. Fountain of Life, Inc.*, 110 N.C. App. 298, 429 S.E.2d 435 (1993).

§ 1C-1703. Filing and status of foreign judgments.

CASE NOTES

This section specifically sets out how and where the judgment must be filed, and the specific documents which must be served on the defendant, in § 1C-1704(a). *Sun Bank/South Fla. v. Tracy*, 104 N.C. App. 608, 410 S.E.2d 509 (1991).

Authenticated Foreign Judgment.

— In an action to enforce a foreign judg-

ment under this Article of the General Statutes, in the absence of any evidence from the judgment debtor, the introduction of a properly authenticated foreign judgment entitled the foreign judgment to full faith and credit. *Lust v. Fountain of Life, Inc.*, 110 N.C. App. 298, 429 S.E.2d 435 (1993).

§ 1C-1704. Notice of filing; service.

CASE NOTES

Service and proof of service of the notice may be made in any manner provided for in Rule 4(j) of the Rules of Civil Procedure. *Sun Bank/South Fla. v. Tracy*, 104 N.C. App. 608, 410 S.E.2d 509 (1991).

Cited in *Lust v. Fountain of Life, Inc.*, 110 N.C. App. 298, 429 S.E.2d 435 (1993).

§ 1C-1705. Defenses; procedure.

CASE NOTES

Grounds for Attacking Foreign Judgment. — A judgment of another state may be attacked in this state only on grounds of fraud, public policy, or lack of jurisdiction. *Reinwand v. Swiggett*, 107 N.C. App. 590, 421 S.E.2d 367 (1992).

Judicial Review of Foreign Judgment. — Review of the jurisdiction of a court rendering a judgment is limited to determining if the issues were indeed fully and fairly litigated. *Reinwand v. Swiggett*, 107 N.C. App. 590, 421 S.E.2d 367 (1992).

Contesting Jurisdictional Issues. — For full faith and credit purposes, appearing specially to contest jurisdictional issues constitutes litigation of those issues. *Reinwand v. Swiggett*, 107 N.C. App. 590, 421 S.E.2d 367 (1992).

Where Jurisdiction Fully and Fairly Litigated. — Upon a finding that the issue of jurisdiction was fully

and fairly litigated, constitutional federal principles preclude their relitigation elsewhere. *Reinwand v. Swiggett*, 107 N.C. App. 590, 421 S.E.2d 367 (1992).

Where the issue of personal jurisdiction was fully and fairly litigated in the Alaska court, defendant was precluded from relitigating the issue in the courts of North Carolina. *Reinwand v. Swiggett*, 107 N.C. App. 590, 421 S.E.2d 367 (1992).

Alaska Judgment. — For a case holding that plaintiff met his burden of proving that a judgment of the state courts of Alaska was entitled to full faith and credit, see *Reinwand v. Swiggett*, 107 N.C. App. 590, 421 S.E.2d 367 (1992).

Cited in *Lust v. Fountain of Life, Inc.*, 110 N.C. App. 298, 429 S.E.2d 435 (1993).

ARTICLE 18.

North Carolina Foreign Money Judgments Recognition Act.

§ 1C-1800. Short title.

This Article may be cited as the North Carolina Foreign Money Judgments Recognition Act. (1993, c. 188, s. 1.)

Editor's Note. — Session Laws 1993, c. 188, s. 2 made this article effective October 1, 1993 and applicable to any

foreign judgments, as defined in G.S. 1C-1801, as enacted in section 1 of the act, entered on or after that date.

§ 1C-1801. Definitions.

As used in this Article:

- (1) "Foreign judgment" means any judgment of a foreign state granting or denying recovery of a sum of money, other than a judgment for taxes, a fine or other penalty, or a judgment for support in matrimonial or family matters.
- (2) "Foreign state" means any governmental unit other than the United States, any state, district, commonwealth, territory, insular possession thereof, the Panama Canal Zone, the Trust Territory of the Pacific Islands, or the Ryukyu Islands. (1993, c. 188, s. 1.)

§ 1C-1802. Applicability of Article.

This Article applies to any foreign judgment that is final and conclusive and enforceable where rendered even though an appeal of the judgment is pending or the judgment is subject to appeal. (1993, c. 188, s. 1.)

§ 1C-1803. Recognition and enforcement.

Except as provided in G.S. 1C-1804, a foreign judgment meeting the requirements of G.S. 1C-1802 is conclusive between the parties to the extent that it grants or denies recovery of a sum of money. The foreign judgment is enforceable in the manner set forth in Article 17 of this Chapter. The defenses available to a judgment debtor under G.S. 1C-1804 may be asserted by the judgment debtor in the manner set forth in G.S. 1C-1705. (1993, c. 188, s. 1.)

§ 1C-1804. Grounds for nonrecognition.

- (a) A foreign judgment is not conclusive if:
 - (1) The judgment was rendered under a system that does not provide impartial tribunals or procedures compatible with the requirements of due process of law;
 - (2) The foreign court did not have personal jurisdiction over the defendant; or
 - (3) The foreign judgment did not have jurisdiction over the subject matter.
- (b) A foreign judgment need not be recognized if:
 - (1) The defendant in the proceedings in the foreign court did not receive notice of the proceedings in sufficient time to enable the presentation of a defense;
 - (2) The judgment was obtained by fraud;
 - (3) The cause of action on which the judgment is based is repugnant to the public policy of this State;
 - (4) The judgment conflicts with another final and conclusive judgment;
 - (5) The proceedings in the foreign court were contrary to an agreement between the parties under which the dispute in question was to be settled out of court;
 - (6) In the case of jurisdiction based on personal service, the foreign court was a seriously inconvenient forum for the trial of the action; or

- (7) The foreign court rendering the judgment would not recognize a comparable judgment of this State. (1993, c. 188, s. 1.)

§ 1C-1805. Basis for personal jurisdiction.

(a) The foreign judgment shall not be refused recognition for lack of personal jurisdiction if:

- (1) The defendant was served personally in the foreign state;
- (2) The defendant voluntarily appeared in the proceedings, other than for the purpose of protecting property seized or threatened with seizure in the proceeding or of contesting the jurisdiction of the court over the defendant;
- (3) The defendant, prior to the commencement of the proceedings, had agreed to submit to the jurisdiction of the foreign court with respect to the subject matter involved;
- (4) The defendant was domiciled in the foreign state when the proceedings were instituted, or, being a body corporate had its principal place of business, was incorporated, or had otherwise acquired corporate status, in the foreign state;
- (5) The defendant had a business office in the foreign state, and the proceedings in the foreign court involved a cause of action arising out of business done by the defendant through that office in the foreign state; or
- (6) The defendant operated a motor vehicle or airplane in the foreign state and the proceedings involved a cause of action arising out of such operation.

(b) The courts of this State may recognize other bases of jurisdiction. (1993, c. 188, s. 1.)

§ 1C-1806. Stay pending an appeal.

If the defendant satisfies the court either that an appeal is pending or that the defendant is entitled and intends to appeal from the foreign judgment, the court may stay the proceedings until the appeal has been determined or until the expiration of a period of time sufficient to enable the defendant to prosecute the appeal. (1993, c. 188, s. 1.)

§ 1C-1807. Situations not covered by Article.

This Article does not prevent the recognition of foreign judgment [judgments] in situations not covered by this Article. (1993, c. 188, s. 1.)

Editor's Note. — The word "judgments" has been inserted in brackets in this section, as the word probably intended by the legislature.

§ 1C-1808. Uniformity of interpretation.

This Article shall be construed to effectuate its general purpose to make uniform the law of those states that enact it. (1993, c. 188, s. 1.)

Chapter 4.

Common Law.

§ 4-1. Common law declared to be in force.

Legal Periodicals. —

For article discussing the influence, past and future, of civil law on common law jurisdictions, see 1990 Duke L.J. 1207.

For note, "Its Days were Numbered: The Year and a Day Rule Falls in North Carolina — *State v. Vance*," see 14 Campbell L. Rev. 235 (1992).

CASE NOTES

- I. General Consideration.
- II. Illustrative Cases.
 - B. Criminal.

I. GENERAL CONSIDERATION.

Historical Background. —

Since the American Revolution and our independence, the common law has continued to apply in North Carolina. *Hall v. Post*, 323 N.C. App. 259, 372 S.E.2d 711 (1988).

Applied in *State v. Crawford*, 329 N.C. 466, 406 S.E.2d 579 (1991).

Cited in *State v. Mann*, 317 N.C. 164, 345 S.E.2d 365 (1986); *Cheape v. Town of Chapel Hill*, 320 N.C. 549, 359 S.E.2d 792 (1987); *State v. Beale*, 324 N.C. 87,

376 S.E.2d 1 (1989); *Hatcher v. Rose*, 329 N.C. 626, 407 S.E.2d 172 (1991).

II. ILLUSTRATIVE CASES.

B. Criminal.

The year and a day rule has become "obsolete," within the meaning of that term as used in this section, and is no longer part of the common law of North Carolina for any purpose. *State v. Vance*, 328 N.C. 613, 403 S.E.2d 495 (1991).

Chapter 5A.

Contempt.

Article 1.

Criminal Contempt.

Sec.

5A-11. Criminal contempt.

5A-12. Punishment; circumstances for fine or imprisonment; reduction of punishment; other measures.

5A-15. Plenary proceedings for contempt.

Article 2.

Civil Contempt.

Sec.

5A-22. Release when civil contempt no longer continues.

5A-23. Proceedings for civil contempt.

ARTICLE 1.

Criminal Contempt.

§ 5A-11. Criminal contempt.

(a) Except as provided in subsection (b), each of the following is criminal contempt:

- (1) Willful behavior committed during the sitting of a court and directly tending to interrupt its proceedings.
- (2) Willful behavior committed during the sitting of a court in its immediate view and presence and directly tending to impair the respect due its authority.
- (3) Willful disobedience of, resistance to, or interference with a court's lawful process, order, directive, or instruction or its execution.
- (4) Willful refusal to be sworn or affirmed as a witness, or, when so sworn or affirmed, willful refusal to answer any legal and proper question when the refusal is not legally justified.
- (5) Willful publication of a report of the proceedings in a court that is grossly inaccurate and presents a clear and present danger of imminent and serious threat to the administration of justice, made with knowledge that it was false or with reckless disregard of whether it was false. No person, however, may be punished for publishing a truthful report of proceedings in a court.
- (6) Willful or grossly negligent failure by an officer of the court to perform his duties in an official transaction.
- (7) Willful or grossly negligent failure to comply with schedules and practices of the court resulting in substantial interference with the business of the court.
- (8) Willful refusal to testify or produce other information upon the order of a judge acting pursuant to Article 61 of Chapter 15A, Granting of Immunity to Witnesses.
- (9) Willful communication with a juror in an improper attempt to influence his deliberations.
- (9a) Willful refusal by a defendant to comply with a condition of probation.
- (10) Any other act or omission specified elsewhere in the General Statutes of North Carolina as grounds for criminal contempt.

The grounds for criminal contempt specified here are exclusive, regardless of any other grounds for criminal contempt which existed at common law.

(b) No person may be held in contempt under this section on the basis of the content of any broadcast, publication, or other communication unless it presents a clear and present danger of an imminent and serious threat to the administration of criminal justice.

(c) This section is subject to the provisions of G.S. 7A-276.1, Court orders prohibiting publication or broadcast of reports of open court proceedings or reports of public records banned. (1977, c. 711, s. 3; 1994, Ex. Sess., c. 19, s. 1.)

Effect of Amendments. — The 1994 Extra Session amendment, effective May 1, 1994, and applicable to defendants sentenced on or after that date, added subdivision (a)(9a).

Legal Periodicals. —

For article, "The Distinction Between Civil and Criminal Contempt in North Carolina," see 67 N.C.L. Rev. 1281 (1989).

CASE NOTES

- I. General Consideration.
- IV. Acts Constituting Contempt.
 - A. In General.
 - B. Disruptive Conduct.
 - C. Disobedience of Orders.

I. GENERAL CONSIDERATION.

Notice of Charges and Opportunity to Be Heard. — The principles of due process require that before an attorney is finally adjudicated in contempt and sentenced after a trial for conduct during the trial, he should have reasonable notice of the specific charges and opportunity to be heard in his own behalf. *In re Paul*, 84 N.C. App. 491, 353 S.E.2d 254, cert. denied, 319 N.C. 673, 356 S.E.2d 779 (1987), 484 U.S. 1004, 108 S. Ct. 694, 98 L. Ed. 2d 646 (1988).

The superior court judge was well within the bounds of the court's inherent authority to manage the case docket when he struck defendant's answer as sanction for willful failure to execute agreed settlement because defendants offered no plausible excuse as to why they did not execute the two paragraph consent judgment, saying only that they did not understand it and in addition judge gave notice that failure to file consent order would result in the imposition of sanctions. *Lomax v. Shaw*, 101 N.C. App. 560, 400 S.E.2d 97 (1991).

Failure to Comply with Schedules. — The trial judge has the power to hold a party in contempt for willful or grossly negligent failure to comply with schedules and practices of the court resulting

in substantial interference with the business of the court. *Lomax v. Shaw*, 101 N.C. App. 560, 400 S.E.2d 97 (1991).

Stated in *In re Nakell*, 104 N.C. App. 638, 411 S.E.2d 159 (1991).

Cited in *State v. Brown*, 110 N.C. App. 658, 430 S.E.2d 433 (1993).

IV. ACTS CONSTITUTING CONTEMPT.

A. In General.

In order for an act to be "willful," as the term is used in criminal law, it must be done deliberately and purposefully in violation of law, and without authority, justification or excuse. *State v. Chriscoe*, 85 N.C. App. 155, 354 S.E.2d 289 (1987).

"Grossly negligent," for purposes of criminal culpability, implies recklessness or carelessness that shows a thoughtless disregard of consequences or a heedless indifference to the rights of others. *State v. Chriscoe*, 85 N.C. App. 155, 354 S.E.2d 289 (1987).

Willfulness or Gross Negligence Not Shown. — Where evidence showed that defendant's short delay of an hour or an hour and a quarter in arriving at court was due, not merely to an absence of transportation, but also to her concern for her mother's safety brought about by her mother's failure to arrive on time or

to answer the telephone, defendant's behavior did not rise to the level of willfulness or gross negligence. *State v. Chriscoe*, 85 N.C. App. 155, 354 S.E.2d 289 (1987).

B. Disruptive Conduct.

Employment of Individual to Disrupt Criminal Trial. — Evidence held sufficient to support the trial judge's finding that respondent attorney solicited an individual to disrupt the criminal trial of his client, thereby committing willful behavior during the sitting of a court which tended to interrupt its proceedings, in violation of subsection (a) of this section. *In re Paul*, 84 N.C. App. 491, 353 S.E.2d 254, cert. denied, 319 N.C. 673, 356 S.E.2d 779 (1987), 484 U.S. 1004, 108 S. Ct. 694, 98 L. Ed. 2d 646 (1988).

C. Disobedience of Orders.

Deliberate Disobedience Irrespective of Intent. — Attorney willfully disobeyed a lawful order of the court in a manner that was likely to interrupt the matters before the court where he deliberately disobeyed the judge's repeated orders to sit down and be quiet, and while it was unlikely that he intended any insult or injury to the court, he consciously disobeyed direct orders and was properly convicted of criminal contempt. *Nakell v. Attorney General*, 15 F.3d 319 (4th Cir. 1994).

In the absence of an order to be present, defendant may not be held in contempt for violation of such an order. *State v. Chriscoe*, 85 N.C. App. 155, 354 S.E.2d 289 (1987).

Conditioning of Probation or Suspended Sentence on Contemnor's Purging Himself. — The imposition of probationary conditions under § 15A-1343 and the possibility of early termi-

nation under § 15A-1342(b) do not transform probationary or suspended sentences into civil relief. However, specifically conditioning the imposition or effect of the probationary or suspended sentence upon the contemnor's purging himself would constitute civil relief. *Bishop v. Bishop*, 90 N.C. App. 499, 369 S.E.2d 106 (1988).

Order Allowing Defendant to Avoid Confinement by Paying Arrearages Held Remedial Relief. — Where the court ordered defendant confined in jail for a period of 29 days, but it allowed defendant to avoid that punishment altogether by paying the entire amount of child support arrearages, this constituted remedial relief and therefore required that the court's order be construed as adjudicating defendant in civil contempt. *Bishop v. Bishop*, 90 N.C. App. 499, 369 S.E.2d 106 (1988).

Violations of Court's Holding Regarding Standing. — Where court repeatedly held that former corporation manager had no standing to appeal, but he continued to appeal every decision reached on behalf of corporate defendants in violation of court's orders, trial court had jurisdiction to consider criminal contempt based on corporation manager's repeated violations of the court's orders. *Lowder v. All Star Mills, Inc.*, 100 N.C. App. 318, 396 S.E.2d 92 (1990).

Because an administrative agency of the State is not subject to contempt, respondent, a State employee who was dismissed from his job and later reinstated, could not petition the superior court for a show cause order against petitioner Department of Transportation ("DOT"), an administrative agency of the State, for contempt pursuant to this section or § 5A-21. *North Carolina DOT v. Davenport*, 334 N.C. 428, 432 S.E.2d 303 (1993).

§ 5A-12. Punishment; circumstances for fine or imprisonment; reduction of punishment; other measures.

(a) A person who commits criminal contempt, whether direct or indirect, is subject to censure, imprisonment up to 30 days, fine not to exceed five hundred dollars (\$500.00), or any combination of the three, except that a person who commits a contempt described in G.S. 5A-11(8) is subject to censure, imprisonment not to exceed 6 months, fine not to exceed five hundred dollars (\$500.00), or any combination of the three and a person who has not been arrested who fails to comply with a nontestimonial identification order, is-

sued pursuant to Article 14 of G.S. 15A is subject to censure, imprisonment not to exceed 90 days, fine not to exceed five hundred dollars (\$500.00), or any combination of the three.

(b) Except for contempt under G.S. 5A-11(5) or 5A-11(9), fine or imprisonment may not be imposed for criminal contempt, whether direct or indirect, unless:

(1) The act or omission was willfully contemptuous; or

(2) The act or omission was preceded by a clear warning by the court that the conduct is improper.

(c) The judicial official who finds a person in contempt may at any time withdraw a censure, terminate or reduce a sentence of imprisonment, or remit or reduce a fine imposed as punishment for contempt if warranted by the conduct of the contemnor and the ends of justice.

(d) A person held in criminal contempt under this Article may nevertheless, for the same conduct, be found in civil contempt under Article 2 of this Chapter, Civil Contempt. If a person is found in both civil contempt and criminal contempt for the same conduct, the total period of imprisonment is limited as provided in G.S. 5A-21(c).

(e) A person held in criminal contempt under G.S. 5A-11(9) may nevertheless, for the same conduct, be found guilty of a violation of G.S. 14-225.1, but he must be given credit for any imprisonment resulting from the contempt. (1977, c. 711, s. 3; 1985 (Reg. Sess., 1986), c. 843, s. 1; 1987 (Reg. Sess., 1988), c. 1040, s. 2.)

Editor's Note. —

Session Laws 1987 (Reg. Sess., 1988), c. 1040, s. 1, as amended by Session Laws 1989 (Reg. Sess., 1990), c. 1039, s. 4, extended the expiration date of Session Laws 1985 (Reg. Sess., 1986), c. 843, s. 6, as noted in the main volume, from October 1, 1988, to October 1, 1993. However, Session Laws 1987 (Reg. Sess., 1988), c. 1040, s. 2 amended subsection

(a) of this section to read as it did prior to amendment by Session Laws 1985 (Reg. Sess., 1986), c. 843.

Effect of Amendments. —

The 1987 (Reg. Sess., 1988) amendment, effective October 1, 1988, substituted "6 months" for "18 months" in subsection (a).

CASE NOTES

Punishment for Criminal and Civil Contempt, etc. —

A major factor in determining whether contempt is criminal or civil is the purpose for which the power is exercised. Where the punishment is to preserve the court's authority and to punish disobedience of its orders, it is criminal contempt. Where the purpose is to provide a remedy for an injured suitor and to coerce compliance with an order, the contempt is civil. The importance in distinguishing criminal and civil contempt lies in the difference in procedure, punishment and right of review. *Bishop v. Bishop*, 90 N.C. App. 499, 369 S.E.2d 106 (1988).

Contempt may be of two kinds, civil or criminal, although the demarcation between the two may be hazy at best.

Criminal contempt is generally applied where the judgment is in punishment of an act already accomplished, tending to interfere with the administration of justice. Civil contempt is a term applied where the proceeding is had to preserve the rights of private parties and to compel obedience to orders and decrees made for the benefit of such parties. *Bishop v. Bishop*, 90 N.C. App. 499, 369 S.E.2d 106 (1988).

Provision in a criminal contempt adjudication requiring defendant to pay \$3,150 in damages to plaintiff was invalid, because this section limits the punishment that can be imposed for criminal contempts to a fine of \$500 and 30 days in jail; and damages may not be awarded to a private party because of any contempt, which is an offense

against the State. *M.G. Newell Co. v. Wyrick*, 91 N.C. App. 98, 370 S.E.2d 431 (1988).

Conditioning of Probation or Suspended Sentence on Contemnor's Purging Himself. — The imposition of probationary conditions under § 15A-1343 and the possibility of early termination under § 15A-1342(b) do not transform probationary or suspended sentences into civil relief. However, specifically conditioning the imposition or effect of the probationary or suspended sentence upon the contemnor's purging himself would constitute civil relief. *Bishop v. Bishop*, 90 N.C. App. 499, 369 S.E.2d 106 (1988).

Order Allowing Defendant to Avoid Confinement by Paying Arrearages Held Remedial Relief. — Where the court ordered defendant confined in jail for a period of 29 days, but it allowed defendant to avoid that punish-

ment altogether by paying the entire amount of child support arrearages, this constituted remedial relief and therefore required that the court's order be construed as adjudicating defendant in civil contempt. *Bishop v. Bishop*, 90 N.C. App. 499, 369 S.E.2d 106 (1988).

Where the judge converted an entry into a final judgment, the violation of which subjected the defendant to criminal contempt of court, punishable under subsection (a), the trial court erred when it imposed a term of imprisonment of six months, suspended for five years under the supervision of a probation officer; therefore, the case was remanded for a hearing on contempt pursuant to § 5A-11(a)(3). *State v. Brown*, 110 N.C. App. 658, 430 S.E.2d 433 (1993).

Cited in *North Carolina DOT v. Dav-enport*, 334 N.C. 428, 432 S.E.2d 303 (1993).

§ 5A-13. Direct and indirect criminal contempt; proceedings required.

CASE NOTES

Defendant's failure to appear at a show cause hearing was classified as indirect criminal contempt since trial judge had no direct knowledge of facts which would establish that defendant's failure to appear was willful. *Cox v. Cox*, 92 N.C. App. 702, 376 S.E.2d 13 (1989).

Deliberate Disobedience Irrespective of Intent. — Attorney willfully disobeyed a lawful order of the court in a manner that was likely to interrupt the matters before the court where he deliberately disobeyed the judge's repeated orders to sit down and be quiet, and

while it was unlikely that he intended any insult or injury to the court, he consciously disobeyed direct orders and was properly convicted of criminal contempt. *Nakell v. Attorney General*, 15 F.3d 319 (4th Cir. 1994).

Requirements of Due Process. — The requirements of due process are met when one charged with contempt is afforded notice and an opportunity to be heard; delayed summary contempt proceedings are also consistent with due process. *Nakell v. Attorney General*, 15 F.3d 319 (4th Cir. 1994).

§ 5A-14. Summary proceedings for contempt.

CASE NOTES

Cited in *Cox v. Cox*, 92 N.C. App. 702, 376 S.E.2d 13 (1989).

§ 5A-15. Plenary proceedings for contempt.

(a) When a judicial official chooses not to proceed summarily against a person charged with direct criminal contempt or when he may not proceed summarily, he may proceed by an order directing the person to appear before a judge at a reasonable time specified in the order and show cause why he should not be held in contempt of court. A copy of the order must be furnished to the person charged. If the criminal contempt is based upon acts before a judge which so involve him that his objectivity may reasonably be questioned, the order must be returned before a different judge.

(b) Proceedings under this section are before a district court judge unless a court superior to the district court issued the order, in which case the proceedings are before that court. Venue lies throughout the district court district as defined in G.S. 7A-133 or superior court district or set of districts as defined in G.S. 7A-41.1, as the case may be, where the order was issued.

(c) The person ordered to show cause may move to dismiss the order.

(d) The judge is the trier of facts at the show cause hearing.

(e) The person charged with contempt may not be compelled to be a witness against himself in the hearing.

(f) At the conclusion of the hearing, the judge must enter a finding of guilty or not guilty. If the person is found to be in contempt, the judge must make findings of fact and enter judgment. The facts must be established beyond a reasonable doubt.

(g) The judge presiding over the hearing may appoint a prosecutor or, in the event of an apparent conflict of interest, some other member of the bar to represent the court in hearings for criminal contempt. (1977, c. 711, s. 3; 1987 (Reg. Sess., 1988), c. 1037, s. 44.)

Effect of Amendments. — The 1987 (Reg. Sess., 1988) amendment, effective January 1, 1989, substituted "district court district as defined in G.S. 7A-133

or superior court district or set of districts as defined in G.S. 7A-41.1, as the case may be" for "judicial district" in the second sentence of subsection (b).

CASE NOTES

Notice of Charges and Opportunity to Be Heard. — The principles of due process require that before an attorney is finally adjudicated in contempt and sentenced after a trial for conduct during the trial, he should have reasonable notice of the specific charges and opportunity to be heard in his own behalf. *In re Paul*, 84 N.C. App. 491, 353 S.E.2d 254, cert. denied, 319 N.C. 673,

356 S.E.2d 779 (1987), 484 U.S. 1004, 108 S. Ct. 694, 98 L. Ed. 2d 646 (1988).

Applied in *Cox v. Cox*, 92 N.C. App. 702, 376 S.E.2d 13 (1989).

Cited in *State v. Fie*, 320 N.C. 626, 359 S.E.2d 774 (1987); *Bishop v. Bishop*, 90 N.C. App. 499, 369 S.E.2d 106 (1988); *Hartsell v. Hartsell*, 99 N.C. App. 380, 393 S.E.2d 570 (1990).

§ 5A-17. Appeals.

CASE NOTES

Quoted in *State v. Mauney*, 106 N.C. App. 26, 415 S.E.2d 208 (1992). N.C. App. 510, 391 S.E.2d 210 (1990);
Vaughn v. Vaughn, 99 N.C. App. 574,
 Cited in *Hammock v. Bencini*, 98 393 S.E.2d 567 (1990).

ARTICLE 2.

Civil Contempt.

§ 5A-21. Civil contempt; imprisonment to compel compliance.

Legal Periodicals. — Carolina," see 67 N.C.L. Rev. 1281
 For article, "The Distinction Between (1989).
 Civil and Criminal Contempt in North

CASE NOTES

- I. General Consideration.
- II. Orders Enforceable as Civil Contempt.
- III. Purging Contempt.
- IV. Practice and Procedure.
- V. Appeal and Error.

I. GENERAL CONSIDERATION.

An administrative agency of the State is not subject to contempt. North Carolina DOT v. Davenport, 334 N.C. 428, 432 S.E.2d 303 (1993).

Disobedience Must Be Willful. —

In accord with second paragraph in the main volume. See *Harris v. Harris*, 91 N.C. App. 699, 373 S.E.2d 312 (1988).

Thus, Defendant Must Possess Means, etc. —

The purpose of civil contempt is to coerce compliance with a court order; therefore, present ability or means to satisfy that order is essential. *Adkins v. Adkins*, 82 N.C. App. 289, 346 S.E.2d 220 (1986).

Conduct Held Willful. — Defendant's voluntary purging of assets in bankruptcy was considered a deliberate divestment of assets; therefore, failure to comply with a child support order was willful and punishable by contempt proceedings. *Harris v. Harris*, 91 N.C. App. 699, 373 S.E.2d 312 (1988).

Findings on Means to Comply Held Adequate. — Trial court's finding regarding contemnor's "present means to comply" held minimally sufficient to satisfy the statutory requirement for civil

contempt, although specific findings supporting the contemnor's present means are preferable. *Adkins v. Adkins*, 82 N.C. App. 289, 346 S.E.2d 220 (1986).

No Authority to Award Costs to Private Party in Contempt Proceeding. — A North Carolina court has no authority to award damages in the form of costs to a private party in a contempt proceeding. *Green v. Crane*, 96 N.C. App. 654, 386 S.E.2d 757 (1990).

Although labeled "civil" contempt, a proceeding as for contempt is by no means a civil action or proceeding to which § 6-18 (when costs shall be allowed to plaintiff as a matter of course) or § 6-20 (allowance of costs in discretion of court) would apply. *Green v. Crane*, 96 N.C. App. 654, 386 S.E.2d 757 (1990).

Court Not Authorized to Award Attorneys' Fees. — In a contempt action for the enforcement of a consent judgment regarding defendant's obligation to pay daughter's college tuition, the trial court was without authority to award the plaintiff attorneys' fees. *Powers v. Powers*, 103 N.C. App. 697, 407 S.E.2d 269 (1991).

Consent Judgment Not Enforce-

able Through Contempt Powers. — Where the judgment on which the trial court based its contempt order did not reflect a determination by the trial court of either issues of fact or conclusions of law presented by the case before it, the order was merely a recital of the parties' agreement and not an adjudication of rights. Consequently, the consent judgment was not an order enforceable through the contempt powers of the court. *Crane v. Green*, 114 N.C. App. 105, 441 S.E.2d 144 (1994).

II. ORDERS ENFORCEABLE AS CIVIL CONTEMPT.

Order Allowing Defendant to Avoid Confinement by Paying Arrearages Held Remedial Relief. — Where the court ordered defendant confined in jail for a period of 29 days, but it allowed defendant to avoid that punishment altogether by paying the entire amount of child support arrearages, this constituted remedial relief and therefore required that the court's order be construed as adjudicating defendant in civil contempt. *Bishop v. Bishop*, 90 N.C. App. 499, 369 S.E.2d 106 (1988).

III. PURGING CONTEMPT.

Conditioning of Probation or Sus-

pending Sentence on Contemnor's Purging Himself. — The imposition of probationary conditions under § 15A-1343 and the possibility of early termination under § 15A-1342(b) do not transform probationary or suspended sentences into civil relief. However, specifically conditioning the imposition or effect of the probationary or suspended sentence upon the contemnor's purging himself would constitute civil relief. *Bishop v. Bishop*, 90 N.C. App. 499, 369 S.E.2d 106 (1988).

IV. PRACTICE AND PROCEDURE.

Where the trial court made no findings of defendant's ability to pay the entire arrearage arising from nonpayment of child support, the Court of Appeals was required to conclude that there were inadequate findings to support the adjudication of civil contempt. *Bishop v. Bishop*, 90 N.C. App. 499, 369 S.E.2d 106 (1988).

V. APPEAL AND ERROR.

Scope of Review. —

In accord with the main volume. See *Adkins v. Adkins*, 82 N.C. App. 289, 346 S.E.2d 220 (1986).

§ 5A-22. Release when civil contempt no longer continues.

(a) A person imprisoned for civil contempt must be released when his civil contempt no longer continues. The order of the court holding a person in civil contempt must specify how the person may purge himself of the contempt. Upon finding compliance with the specifications, the sheriff or other officer having custody may release the person without a further order from the court.

(b) On motion of the contemnor, the court must determine if he is subject to release and, on an affirmative determination, order his release. The motion must be directed to the judge who found civil contempt unless he is not available. Then the motion must be made to a judge of the same division in the same district court district as defined in G.S. 7A-133 or superior court district or set of districts as defined in G.S. 7A-41.1, as the case may be. The contemnor may also seek his release under other procedures available under the law of this State. (1977, c. 711, s. 3; 1987 (Reg. Sess., 1988), c. 1037, s. 45.)

Effect of Amendments. — The 1987 (Reg. Sess., 1988) amendment, effective January 1, 1989, substituted "same district court district as defined in G.S. 7A-133 or superior court district or set of

districts as defined in G.S. 7A-41.1, as the case may be" for "same judicial district" in the next-to-last sentence of subsection (b).

CASE NOTES

Trial Court Without Authority to Require Contemnor to Pay Compensatory Damages. — Upon a finding of contempt, in situations where the original order requires a transfer of property (including intangible property such as that represented by stock certificates), the trial court has authority to order the contemnor to transfer said property as a condition of purging the contempt, but

does not have authority to require the contemnor to pay compensatory damages incurred as a result of his noncompliance with the original order. *Hartsell v. Hartsell*, 99 N.C. App. 380, 393 S.E.2d 570 (1990), *aff'd*, 328 N.C. 729, 403 S.E.2d 307 (1991).

Cited in *Leonard v. Hammond*, 804 F.2d 838 (4th Cir. 1986).

§ 5A-23. Proceedings for civil contempt.

(a) Proceedings for civil contempt are either by the order of a judicial official directing the alleged contemnor to appear at a specified reasonable time and show cause why he should not be held in civil contempt or by the notice of a judicial official that the alleged contemnor will be held in contempt unless he appears at a specified reasonable time and shows cause why he should not be held in contempt. The order or notice must be given at least five days in advance of the hearing unless good cause is shown. The order or notice may be issued on the motion and sworn statement or affidavit of one with an interest in enforcing the order, including a judge, and a finding by the judicial official of probable cause to believe there is civil contempt.

(b) Except when the General Statutes specifically provide for the exercise of contempt power by the clerk of superior court, proceedings under this section are before a district court judge, unless a court superior to the district court issued the order in which case the proceedings are before that court. When the proceedings are before a superior court, venue is in the superior court district or set of districts as defined in G.S. 7A-41.1 of the court which issued the order. Otherwise, venue is in the county where the order was issued.

(c) The person ordered to show cause may move to dismiss the order.

(d) The judicial official is the trier of facts at the show cause hearing.

(e) At the conclusion of the hearing, the judicial official must enter a finding for or against the alleged contemnor. If civil contempt is found, the judicial official must enter an order finding the facts constituting contempt and specifying the action which the contemnor must take to purge himself of the contempt.

(f) A person with an interest in enforcing the order may present the case for a finding of civil contempt for failure to comply with an order.

(g) A judge conducting a hearing to determine if a person is in civil contempt may at that hearing, upon making the required findings, find the person in criminal contempt for the same conduct, regardless of whether imprisonment for civil contempt is proper in the case. (1977, c. 711, s. 3; 1979, 2nd Sess., c. 1080, ss. 2-4; 1987 (Reg. Sess., 1988), c. 1037, s. 46.)

Effect of Amendments. — The 1987 (Reg. Sess., 1988) amendment, effective January 1, 1989, substituted “superior court district or set of districts as defined

in G.S. 7A-41.1” for “judicial district” in the next-to-last sentence of subsection (b).

CASE NOTES

Defendant’s Rights under U.S. Const., Amend. V Not Implicated in Civil Contempt Case. — Where trial court ordered defendant incarcerated, gave defendant the opportunity to purge his contempt by complying with prior consent order and paying certain sums for attorney’s fees and damages, and imposed no other penalty, the relief granted was wholly civil in nature. Since defendant was not, in fact, subject to criminal penalties, there was no necessity to examine whether defendant’s rights under U.S. Const., Amend. V were adequately protected during the contempt proceeding. *Hartsell v. Hartsell*, 99 N.C. App. 380, 393 S.E.2d 570 (1990), *aff’d*, 328 N.C. 729, 403 S.E.2d 307 (1991).

Judge was authorized to shorten notice period of civil contempt hearing for good cause, where the defendant had known for several months of the particular charges pending against him and had had ample opportunity to prepare to meet them, where all the wit-

nesses, some of whom had been in court on earlier occasions, were present, along with the parties, and where defendant’s lawyer acknowledged that his argument for delaying the hearing was based, not upon any unreadiness to proceed, but upon his mistaken impression that a hearing upon less than five days notice was automatically invalid. *M.G. Newell Co. v. Wyrick*, 91 N.C. App. 98, 370 S.E.2d 431 (1988).

Defendant Held Not Entitled to Notice. — Where the defendant had notice of civil contempt hearing and he was simultaneously adjudged to be in both civil and criminal contempt, defendant was entitled to no notice as to the criminal contempt, as subsection (g) of this section expressly authorizes a judge conducting a hearing to determine civil contempt to “find the person in criminal contempt for the same conduct” upon making the required findings. *M.G. Newell Co. v. Wyrick*, 91 N.C. App. 98, 370 S.E.2d 431 (1988).

§ 5A-24. Appeals.

CASE NOTES

Quoted in *State v. Mauney*, 106 N.C. App. 26, 415 S.E.2d 208 (1992).

Cited in *Crane v. Green*, 114 N.C. App. 105, 441 S.E.2d 144 (1994).

Chapter 6.

Liability for Court Costs.

Article 3.

Civil Actions and Proceedings.

Sec.

6-21.3. Remedies for returned check.

Sec.

6-24. Suits by an indigent; payment of costs by an indigent.

ARTICLE 1.

Generally.

§ 6-1. Items allowed as costs.

CASE NOTES

I. General Consideration.

I. GENERAL CONSIDERATION.

Trial judges are authorized to tax court costs, and if the court misused its authority in taxing costs against pauper

plaintiff, that error was waived by her failure to appeal therefrom. *Schaffner v. Pantelakos*, 98 N.C. App. 399, 391 S.E.2d 41 (1990).

ARTICLE 3.

Civil Actions and Proceedings.

§ 6-18. When costs allowed as of course to plaintiff.

Legal Periodicals. —

For article, "Awarding Attorney Fees

Against Adversaries: Introducing the Problem," see 1986 Duke L.J. 435.

CASE NOTES

I. General Consideration.

I. GENERAL CONSIDERATION.

Section Inapplicable to Contempt Proceeding. —

In accord with the main volume. See *Green v. Crane*, 96 N.C. App. 654, 386 S.E.2d 757 (1990).

A North Carolina court has no authority to award damages in the form of

costs to a private party in a contempt proceeding. *Green v. Crane*, 96 N.C. App. 654, 386 S.E.2d 757 (1990).

Cited in *Alsup v. Pitman*, 98 N.C. App. 389, 390 S.E.2d 750 (1990); *Powers v. Powers*, 103 N.C. App. 697, 407 S.E.2d 269 (1991); *Smith v. McDonald*, 767 F. Supp. 732 (M.D. N.C. 1991).

§ 6-19. When costs allowed as of course to defendant.

CASE NOTES

Cited in *Smith v. McDonald*, 767 F. Supp. 732 (M.D. N.C. 1991).

§ 6-19.1. Attorney's fees to parties appealing or defending against agency decision.

CASE NOTES

Motion Timely. — Petitioner's motion for attorney's fees, filed well before final judgment, was timely; therefore, the trial court had jurisdiction to hear the matter. *Whiteco Indus., Inc. v. Harrelson*, 111 N.C. App. 815, 434 S.E.2d 229 (1993); *Whiteco Indus., Inc. v. Harrington*, 111 N.C. App. 839, 434 S.E.2d 234 (1993), cert. granted, 335 N.C. 565, 441 S.E.2d 135 (1994).

Applied in *Tay v. Flaherty*, 100 N.C. App. 51, 394 S.E.2d 217 (1990); *State ex*

rel. Env'tl. Mgt. Comm'n v. House of Raeford Farms, Inc., 101 N.C. App. 433, 400 S.E.2d 107 (1991); *Able Outdoor, Inc. v. Harrelson*, 113 N.C. App. 483, 439 S.E.2d 245 (1994); *Crowell Constructors, Inc. v. State ex rel. Cobey*, 114 N.C. App. 75, 440 S.E.2d 848 (1994).

Stated in *S.E.T.A. UNC-CH, Inc. v. Huffines*, 107 N.C. App. 440, 420 S.E.2d 674 (1992).

Cited in *In re Magee*, 87 N.C. App. 650, 362 S.E.2d 564 (1987).

§ 6-19.2. Attorney's fees to parties who compel disclosure of public records.

CASE NOTES

Who Is Prevailing Party. — Where petitioners obtained an order from the trial court directing respondents to release the records for inspection, examination and copying pursuant to § 132-9, fact that respondents were able to obtain a stay of the trial court's order pending appeal and argued that the subsequent release of the documents was pursuant to a decision made prior to the suit did not alter the fact that petitioners were the prevailing party in their action. *North Carolina Press Ass'n v. Spangler*, 94 N.C. App. 694, 381 S.E.2d 187, cert. denied, 325 N.C. 709, 388 S.E.2d 461 (1989).

The noncomplying party has the burden of showing justification for nondisclosure. *North Carolina Press Ass'n v. Spangler*, 94 N.C. App. 694, 381 S.E.2d 187, cert. denied, 325 N.C. 709, 388 S.E.2d 461 (1989).

The test for substantial justification is whether respondent's reluctance to disclose was justified to a degree that

could satisfy a reasonable person under the existing law and facts known to, or reasonably believed by, respondent at the time respondent refused to make disclosure. *S.E.T.A. UNC-CH, Inc. v. Huffines*, 107 N.C. App. 440, 420 S.E.2d 674 (1992).

Factors in Determining Substantial Justification. — Assertions of agency's good faith and arguments urging reasonable extensions of existing law are factors to be considered by the trial court in reaching its decision on the issue of substantial justification. *North Carolina Press Ass'n v. Spangler*, 94 N.C. App. 694, 381 S.E.2d 187, cert. denied, 325 N.C. 709, 388 S.E.2d 461 (1989).

When Award Is "Unjust". — The fact that a governmental agency chooses to chart its own course regarding the timing of the requested release of public documents does not make an award of attorneys' fees against it "unjust." *North Carolina Press Ass'n v. Spangler*, 94

N.C. App. 694, 381 S.E.2d 187, cert. denied, 325 N.C. 709, 388 S.E.2d 461 (1989).

Applied in *Tay v. Flaherty*, 100 N.C.

App. 51, 394 S.E.2d 217 (1990); *Crowell Constructors, Inc. v. State ex rel. Cobey*, 114 N.C. App. 75, 440 S.E.2d 848 (1994).

§ 6-20. Costs allowed or not, in discretion of court.

CASE NOTES

Section Inapplicable to Contempt Proceeding. —

In accord with the main volume. See *Green v. Crane*, 96 N.C. App. 654, 386 S.E.2d 757 (1990).

A North Carolina court has no authority to award damages in the form of costs to a private party in a contempt proceeding. *Green v. Crane*, 96 N.C. App. 654, 386 S.E.2d 757 (1990).

Section 7A-320 Does Not Abrogate Court's Authority Under This Section. — Under § 7A-305, which specifies in subsection (d) the costs recoverable in civil actions, and also provides in subsection (e) that nothing in this section shall affect the liability of the respective parties for costs as provided by law, the authority of trial courts to tax deposition expenses as costs pursuant to § 6-20 remains undisturbed, regardless of the language of § 7A-320. *Alsup v. Pitman*, 98 N.C. App. 389, 390 S.E.2d 750 (1990).

Deposition Expenses. —

In accord with the main volume. See *Alsup v. Pitman*, 98 N.C. App. 389, 390 S.E.2d 750 (1990).

This section authorizes trial courts to tax deposition expenses as costs. *Alsup v. Pitman*, 98 N.C. App. 389, 390 S.E.2d 750 (1990).

Trial court had full authority to tax, in its discretion, deposition expenses as costs pursuant to §§ 1A-1, Rule 41(d) and 6-20. *Alsup v. Pitman*, 98 N.C. App. 389, 390 S.E.2d 750 (1990).

Award of Costs for Expert Witnesses. — For case upholding award to plaintiffs as costs of charges of expert witnesses for time spent outside trial and expenses for expert witnesses who testified about the standard of care applicable to nurses in similar communities, see *Campbell ex rel. McMillan v. Pitt County Mem. Hosp.*, 84 N.C. App. 314, 352 S.E.2d 902, aff'd, 321 N.C. 260, 362 S.E.2d 273 (1987), overruled on other grounds, *Johnson v. Ruark Ob. & Gyn. Assocs.*, 327 N.C. 283, 395 S.E.2d 85 (1990), rehearing denied, 327 N.C. 644, 399 S.E.2d 133 (1990).

Applied in *True v. T & W Textile Mach., Inc.*, 112 N.C. App. 358, 435 S.E.2d 551 (1993).

Cited in *Brown v. Rhyne Floral Supply Mfg. Co.*, 89 N.C. App. 717, 366 S.E.2d 894 (1988); *Powers v. Powers*, 103 N.C. App. 697, 407 S.E.2d 269 (1991); *Brandenburg Land Co. v. Champion Int'l Corp.*, 107 N.C. App. 102, 418 S.E.2d 526 (1992).

§ 6-21. Costs allowed either party or apportioned in discretion of court.

Legal Periodicals. —

For note, "A Public Goods Approach to Calculating Reasonable Fees under At-

torney Fee Shifting Statutes," see 1989 Duke L.J. 438.

CASE NOTES

- I. General Consideration.
- II. Costs In Particular Actions.
 - A. Caveats to Wills.
 - G. Actions Not Covered by This Section.
 - H. Illegitimate Children.
- III. Procedure.

I. GENERAL CONSIDERATION.

Attorneys' Fees Properly Awarded to Defendant in Proceeding under Chapter 156. — Assuming that § 105-374(i) is incorporated by reference into Chapter 156, because the section provides for attorneys' fees for taxing authorities does not mean that it prohibits attorneys' fees being taxed as part of the costs for members of drainage districts. *Northampton County Drainage Dist. Number One v. Bailey*, 326 N.C. 742, 392 S.E.2d 352 (1990).

Fees for Services Pursuant to Void Contract. — A trial court has no discretion to award statutory legal fees for services rendered in a child custody and support action pursuant to a contract void as against public policy. *Davis v. Taylor*, 81 N.C. App. 42, 344 S.E.2d 19, cert. denied, 318 N.C. 414, 349 S.E.2d 593 (1986).

Attorneys' Fees and Costs in Drainage Law. — This section provides for an award of costs in all actions under the drainage chapter and authorizes award of attorneys' fees to members of drainage district in action brought by district seeking to collect unpaid assessments and § 105-374(i) even if incorporated by reference into Chapter 156 does not prohibit attorneys' fees from being taxed as part of the costs for members of drainage districts. *Northampton County Drainage Dist. Number One v. Bailey*, 326 N.C. 742, 392 S.E.2d 352 (1990).

Judicial Review. — If the findings of the superior court regarding an award of attorney's fees in a caveat proceeding are supported by the evidence the reviewing court cannot disturb them. 331 N.C. 374, 416 S.E.2d 1 (1992).

Applied in *Lash ex rel. Wilson v. Lash*, 107 N.C. App. 755, 421 S.E.2d 615 (1992); *Beau Rivage Plantation, Inc. v. Melex USA, Inc.*, 112 N.C. App. 446, 436 S.E.2d 152 (1993).

Cited in *Casstevens v. Wagoner*, 99 N.C. App. 337, 392 S.E.2d 776 (1990).

II. COSTS IN PARTICULAR ACTIONS.

A. Caveats to Wills.

As long as a dissent has substantial merit, the court may exercise its discretion in awarding reasonable attorneys' fees. In *re Estate of Tucci*, 104 N.C. App. 142, 408 S.E.2d 859 (1991), cert. dismissed, 331 N.C. 748, 417 S.E.2d 236 (1992).

The substantial merit requirement

under subdivision (2) of this section does not mean success on the merits; in its sound discretion, the trial court may award attorneys' fees even to unsuccessful caveators. In *re Estate of Tucci*, 104 N.C. App. 142, 408 S.E.2d 859 (1991), cert. dismissed, 331 N.C. 748, 417 S.E.2d 236 (1992).

Expense of Caveat Not Cost of Administration. — Costs of administration, as used in § 29-2(5), means those ordinary, usual, and necessary expenses of administering a decedent's estate; a will caveat and its expense is neither of these, for a will caveat is a claim that the will involved is invalid, and its expense is a cost of court taxable against either party, or apportioned among the parties, in the discretion of the court. In *re Estate of Ward*, 97 N.C. App. 660, 389 S.E.2d 441 (1990).

"Common Fund" Not Prerequisite to Award of Costs. — There is no requirement in subdivision (2) of this section that a "common fund be available before costs may be awarded." *McNaull v. McNaull*, 94 N.C. App. 547, 380 S.E.2d 590, cert. denied, 325 N.C. 546, 385 S.E.2d 498 (1989).

Standing to Stipulate to Payment of Attorneys' Fees. — Where estate was taxed with the payment of attorneys' fees pursuant to subdivision (2) of this section, the attorneys' fees were considered to be an item of costs, and since the clerk's order indicated that the attorneys' fees should be paid directly to the law firm involved, and not to the dissenter, only the law firm could stipulate that the clerk's order had been satisfied. In *re Estate of Tucci*, 104 N.C. App. 142, 408 S.E.2d 859 (1991), cert. dismissed, 331 N.C. 748, 417 S.E.2d 236 (1992).

Caveators Should Have Been Apprised of Court's Determination Regarding Fees. — Where the trial court permitted an attorney for all the named caveators to withdraw as counsel of record for certain caveators, implicit in that decision was permission for these caveators to retain their own counsel; therefore, if at the outset of the trial, the court determined that there was duplicity on the part of all counsel in its representation of the caveators, then the caveators should have been apprised that such a determination by the trial court might result in the denial of attorney fees pursuant to subsection (2) of this section, rather than for the trial court to summarily deny a successor law firm's request for fees at the conclusion of the

matter. *Hill v. Cox*, 108 N.C. App. 454, 424 S.E.2d 201 (1993).

Trial Court Abused Its Discretion.

— The trial court abused its discretion by denying a petition of a law firm for approval and award of legal expenses where the trial court implicitly found that the caveat proceeding had substantial merit and where there was evidence that the law firm performed substantial services on behalf of the caveators it represented. *Hill v. Cox*, 108 N.C. App. 454, 424 S.E.2d 201 (1993).

G. Actions Not Covered by This Section.

Court's order that defendant pay legal fees incurred by executor after defendant's default at judicial sale of estate's real and personal property held unauthorized. *Parker v. Lippard*, 87 N.C. App. 43, 359 S.E.2d 492, modified, 87 N.C. App. 487, 361 S.E.2d 395 (1987).

H. Illegitimate Children.

Attorneys' fees incurred in prosecuting paternity actions may not be awarded under § 50-13.6, but may only be assessed as costs under subdivision (10) of this section. *Napowsa v. Langston*, 95 N.C. App. 14, 381 S.E.2d 882, cert. denied, 325 N.C. 709, 388 S.E.2d 460 (1989).

III. PROCEDURE.

Caveat Proceeding. — A caveat proceeding has substantial merit if there is substantial evidence to support the claim. *Dyer v. State*, 102 N.C. App. 480, 402 S.E.2d 464, rev'd on other grounds, 331 N.C. 374, 416 S.E.2d 1 (1992).

Whether a caveat proceeding has substantial merit is a legal question reviewable by the appellate courts de novo. *Dyer v. State*, 102 N.C. App. 480, 402 S.E.2d 464, rev'd on other grounds, 331 N.C. 374, 416 S.E.2d 1 (1992).

§ 6-21.1. Allowance of counsel fees as part of costs in certain cases.

Legal Periodicals. —

For note, "Bad Faith Refusal to Pay First-Party Insurance Claims: A Growing Recognition of Extra-Contract Damages," see 64 N.C.L. Rev. 1421 (1986).

For article, "North Carolina's Cautious Approach Toward the Imposition of

Extracontract Liability on Insurers for Bad Faith," see 21 Wake Forest L. Rev. 957 (1986).

For note, "A Public Goods Approach to Calculating Reasonable Fees Under Attorney Fee Shifting Statutes," see 1989 Duke L.J. 438.

CASE NOTES

- I. General Consideration.
- III. Procedure.
- IV. Settlement.

I. GENERAL CONSIDERATION.

This section refers only to the amount of the judgment, not to the amount of the verdict. *Wells v. Jackson*, 85 N.C. App. 718, 355 S.E.2d 837 (1987).

To overturn trial judge's determination, etc. —

Without a showing of abuse of trial judge's discretion, trial judge's determination to award counsel fees will not be overturned. *Whitfield v. Nationwide Mut. Ins. Co.*, 86 N.C. App. 466, 358 S.E.2d 92 (1987).

Order denying motion pending remand to arbitrator was error. — Judge's order denying plaintiff's motion

for attorney's fees "pending remand to the Arbitrator for a further determination" was error. This section requires the judge upon motion made to award attorney's fees as a part of the costs. *Bass v. Goss*, 105 N.C. App. 242, 412 S.E.2d 145 (1992).

When Insurance Company Not Required to Defend. — Where an insurance company utilized § 20-279.21 (b)(3)a to provide a defense to the insured party, it was a party in the tort actions, although unnamed; therefore, although it was not required to defend the lawsuit, but chose to do so, by so doing it became a defendant and liable for attorney's fees and costs. *Turnage ex rel.*

Turnage v. Nationwide Mut. Ins. Co., 109 N.C. App. 300, 426 S.E.2d 433, *aff'd per curium*, 335 N.C. 168, 435 S.E.2d 772 (1993).

Action Heard Before Arbitrator. — In a civil action heard before an arbitrator where the plaintiff was awarded less than \$10,000, a judge had discretion whether to and in what amount to award attorney's fees. *Bass v. Goss*, 105 N.C. App. 242, 412 S.E.2d 145 (1992).

Attorneys' Fees in Actions under Tort Claims Act. — The Industrial Commission has jurisdiction and authority to award attorneys' fees pursuant to this section for actions brought under the Tort Claims Act. *Karp v. University of N.C.*, 88 N.C. App. 282, 362 S.E.2d 825 (1987), *aff'd*, 323 N.C. 473, 373 S.E.2d 430 (1988).

Defendants Prevailing on Counterclaim for Less Than Amount Sought. — Plaintiff's contention that the legislature did not intend for defendants to be able to collect attorneys' fees when they have prevailed on counterclaims for less than the stated amount was without merit. *Mickens v. Robinson*, 103 N.C. App. 52, 404 S.E.2d 359 (1991).

Applied in First Union Nat'l Bank v. Richards, 90 N.C. App. 650, 369 S.E.2d 620 (1988).

Cited in City Fin. Co. v. Boykin, 86 N.C. App. 466, 358 S.E.2d 83 (1987); *Tay v. Flaherty*, 100 N.C. App. 51, 394 S.E.2d 217 (1990).

III. PROCEDURE.

And Such Findings May, etc. —

Because this statute defines the circumstances under which attorneys' fees may be awarded, the trial court is not required to make specific findings as to the plaintiff's entitlement to such an award. *Epps v. Ewers*, 90 N.C. App. 597, 369 S.E.2d 104 (1988).

Trial court was not required to make findings of fact allocating the time spent on a case between work required to defend against plaintiff's claim and that required to forward defendant's

counterclaim when awarding attorneys' fees to defendant. *Mickens v. Robinson*, 103 N.C. App. 52, 404 S.E.2d 359 (1991).

Finding Insufficient to Award Attorneys' Fees. — Where the only findings of fact in support of the amount of the award for attorneys' fees were that plaintiff's attorney "provided good and valuable services"; that the reasonable value of the services provided by plaintiff's attorney was \$2,000.00; and that plaintiff's fee contract with her attorney provided for a contingent fee of one-third of the damage award, those findings were not sufficient to support an award of \$2,000. *Epps v. Ewers*, 90 N.C. App. 597, 369 S.E.2d 104 (1988).

Award Upheld. — Where defendant's attorneys presented evidence tending to show that they were entitled to a fee of \$8000 for their work, and the trial court, after having carefully reviewed petitioner's hours, awarded \$5000, there was no abuse of discretion in the award. *Mickens v. Robinson*, 103 N.C. App. 52, 404 S.E.2d 359 (1991).

IV. SETTLEMENT.

Attorney's Fees, etc. —

Attorneys' fees may be awarded pursuant to this statute even when damages are recovered by settlement prior to trial. In accord with 1993 Cumulative Supplement. See *Benton v. Thomerson*, 113 N.C. App. 293, 438 S.E.2d 434 (1994).

Amount of Settlement Irrelevant to Determination to Award Attorneys' Fees. — The amount of the final settlements in a civil suit was irrelevant in determining whether to award attorneys' fees. *Epps v. Ewers*, 90 N.C. App. 597, 369 S.E.2d 104 (1988).

There was no unwarranted refusal to settle where insurance company settled within four months of the accident and for a reasonable amount, as evidenced by the similarity between the jury verdict and the settlement amount. *Benton v. Thomerson*, 113 N.C. App. 293, 438 S.E.2d 434 (1994).

§ 6-21.2. Attorneys' fees in notes, etc., in addition to interest.

Legal Periodicals. —

For note, "Preemption of State Law Notice Provisions Governing the Recovery of Attorneys' Fees by Section 506(b)

of the Bankruptcy Code," see 1 *Duke L.J.* 176 (1986).

For note, "A Public Goods Approach to Calculating Reasonable Fees Under At-

torney Fee Shifting Statutes," see 1989 Duke L.J. 438.

For survey on the award of attorneys'

fees for breach of a separation agreement, see 70 N.C.L. Rev. 2016 (1992).

CASE NOTES

This Section Compared to § 1-567.11. — This section generally relates to and concerns the subject of attorneys' fees for legal work performed in the collection of indebtedness under various contractual arrangements and, unlike § 1-567.11, does not specifically address or relate to the subject of arbitration or attorneys' fees through arbitration. *Nucor Corp. v. General Bearing Corp.*, 333 N.C. 148, 423 S.E.2d 747 (1992), reh'g denied, 333 N.C. 349, 426 S.E.2d 708 (1993).

Reasonableness is the key factor under all attorney's fees statutes. *Institution Food House, Inc. v. Circus Hall of Cream, Inc.*, 107 N.C. App. 552, 421 S.E.2d 370 (1992).

Section Not Applicable for Recovery upon Default of Purchase Money Deed of Trust. — This section deals in general and comprehensive terms with the propriety of attorneys' fees arising from the collection of indebtedness and, therefore, was not controlling in a case in which a seller of real property had accepted a purchase money deed of trust from his buyer and then sought recovery upon default; § 45-21.38 deals with just such a particular situation. *Merritt v. Ridge*, 323 N.C. 330, 372 S.E.2d 559 (1988).

This section does not apply to arbitration proceedings; thus, in arbitration proceedings, both the arbitrator or arbitration panel and the superior courts upon confirmation are limited to applying only § 1-567.11 in determining whether attorneys' fees should be or were properly awarded. *Nucor Corp. v. General Bearing Corp.*, 333 N.C. 148, 423 S.E.2d 747 (1992), reh'g denied, 333 N.C. 349, 426 S.E.2d 708 (1993).

Attorneys' Fees of Purchase Money Creditor Not Secured Obligation. — Where a promissory note states on its face that it is "given as purchase money, and is secured by a purchase money deed of trust," and the note is incorporated by reference into the deed of trust, attorneys' fees are not part of the purchase price. Hence, even if the trustee were to foreclose on the purchase money deed of trust, the purchase money creditor's attorneys' fees would not be a secured obligation. *Colson &*

Colson Constr. Co. v. Maultsby, 103 N.C. App. 424, 405 S.E.2d 779 (1991).

Attorneys' fees provided for in an agreement to settle litigation already underway were not "obligations to pay attorneys' fees upon any note ... or other evidence of indebtedness" under this section. Without undermining the intent or force of this section, parties may, in settling disputes, agree to the payment of attorneys' fees; such a case is not controlled by this section. *Carter v. Foster*, 103 N.C. App. 110, 404 S.E.2d 484 (1991).

Choice of Law. — The issue of a party's entitlement to attorneys' fees is a question of substantive law. *Tolaram Fibers, Inc. v. Tandy Corp.*, 92 N.C. App. 713, 375 S.E.2d 673, cert. denied, 324 N.C. 436, 379 S.E.2d 249 (1989).

Counsel fees are not a subject of arbitration, even where the contract provides that the owner will pay reasonable attorneys' fees incurred by the contractor for the collection of any defaulted payment due to the contractor by the owner as a result of the contract. In North Carolina, such attorneys' fees are collectible only under this section. *G.L. Wilson Bldg. Co. v. Thorneburg Hosiery Co.*, 85 N.C. App. 684, 355 S.E.2d 815 (1987), cert. denied, 320 N.C. 798, 361 S.E.2d 75 (1987), aff'd, 94 N.C. App. 769, 381 S.E.2d 718 (1989).

Meaning of "Evidence of Indebtedness." —

In accord with first paragraph in the main volume. See *G.L. Wilson Bldg. Co. v. Thorneburg Hosiery Co.*, 85 N.C. App. 684, 355 S.E.2d 815, cert. denied, 320 N.C. 798, 361 S.E.2d 75 (1987).

Same — Formal credit agreement, etc. —

In accord with the main volume. See *W.S. Clark & Sons v. Ruiz*, 87 N.C. App. 420, 360 S.E.2d 814 (1987).

Same — Stock Purchase Agreement. — A stock purchase agreement was an "evidence of indebtedness" within the contemplation of this section. *Nucor Corp. v. General Bearing Corp.*, 103 N.C. App. 518, 405 S.E.2d 776 (1991), rev'd on other grounds, 333 N.C. 148, 423 S.E.2d 747 (1992), reh'g denied, 333 N.C. 349, 426 S.E.2d 708 (1993).

Award of Percentage Specified in

Subdivision (2). — Subdivision (2) of section expressly provides that when a contract authorizing attorneys' fees does not specify the fee percentage, that it shall be construed to mean 15% of the "outstanding balance" owed on the obligation involved. A court which, in setting the fee, merely followed the statutory mandate would not be reversed. *Nucor Corp. v. General Bearing Corp.*, 103 N.C. App. 518, 405 S.E.2d 776 (1991), rev'd on other grounds, 333 N.C. 148, 423 S.E.2d 747 (1992), reh'g denied, 333 N.C. 349, 426 S.E.2d 708 (1993).

If a lease refers to "reasonable attorney's fees" and does not stipulate a specific percentage, subdivision (2) applies and the amount of attorneys' fees is 15% of the outstanding balance. *Devereux Properties, Inc. v. BBM & W, Inc.*, 114 N.C. App. 621, 442 S.E.2d 555 (1994).

Construction of Subdivision (5). — The notice provision of subdivision (5) of this section simply provides that the obligor will have five days' notice to pay any outstanding balance on the debt before the claimant goes to the expense of employing counsel to collect the balance due. *G.L. Wilson Bldg. Co. v. Thorneburg Hosiery Co.*, 85 N.C. App. 684, 355 S.E.2d 815, cert. denied, 320 N.C. 458, 356 S.E.2d 75 (1987), aff'd, 94 N.C. App. 769, 381 S.E.2d 718 (1989).

Notice Prerequisite to Collection of Attorneys' Fees under Subdivision (5). —

The case law is clear that a party seeking to collect attorneys' fees incurred in the enforcement of a note must notify in writing the opposing party of this intent. *Thomas v. Miller*, 105 N.C. App. 589, 414 S.E.2d 58, cert. denied, 331 N.C. 557, 417 S.E.2d 807 (1992).

Reasonableness as Key Factor. —

Where a lease agreement provided for the payment of "reasonable attorney's fees" should the landlord have needed to employ an attorney to collect rent or enforce its other rights and remedies under the lease, but did not refer to any specific percentage, subdivision (2) of this section predetermined that fifteen percent (15%) was a reasonable amount. *RC Assocs. v. Regency Ventures, Inc.*, 111 N.C. App. 367, 432 S.E.2d 394 (1993).

Notice Held Sufficient. — Notice of intent to enforce attorneys' fees provision of note held sufficient. *Federal Land Bank v. Lieben*, 86 N.C. App. 342, 357 S.E.2d 700 (1987).

Language in a guaranty contract was sufficient to put a guarantor on notice

that he would be liable for attorney's fees if he failed to make the guaranteed payment before the creditor found it necessary to employ an attorney to collect the debt. *RC Assocs. v. Regency Ventures, Inc.*, 111 N.C. App. 367, 432 S.E.2d 394 (1993).

Where an agreement only mentioned reasonable attorneys' fees and did not specify an exact amount to be paid, this section governed, and the trial court properly allowed the plaintiff to recover reasonable fees amounting to 15% of the outstanding balance owed on defendants' account. *W.S. Clark & Sons v. Ruiz*, 87 N.C. App. 420, 360 S.E.2d 814 (1987).

Demand by Obligor for Arbitration. — The notice provisions of subdivision (5) of this section have no application in a situation where the obligor has refused to pay obligee's claim and demanded arbitration pursuant to the terms of the contract. Moreover, when obligee filed its response to obligor's demand for arbitration, and its own claim for the balance due on the contract, it clearly notified obligor that it was demanding attorneys' fees under the terms of the contract. *G.L. Wilson Bldg. Co. v. Thorneburg Hosiery Co.*, 85 N.C. App. 684, 355 S.E.2d 815, cert. denied, 320 N.C. 798, 361 S.E.2d 75 (1987), aff'd, 94 N.C. App. 769, 381 S.E.2d 718 (1989).

Evidence of Indebtedness Held Sufficient. — Credit application signed by partner was sufficient evidence of indebtedness under this section to obligate partnership to pay attorneys' fees. *Hedgecock Bldrs. Supply Co. v. White*, 92 N.C. App. 535, 375 S.E.2d 164 (1989).

No Award of Attorneys' Fees Where Plaintiff Failed to Notify. — Where provision in note provided for payment of note holder's costs and expenses in enforcing note if makers failed to pay as required, and these costs and expenses specifically included "reasonable" attorneys' fees, but there was no evidence that plaintiff notified defendants of its intention to collect attorneys' fees pursuant to this section, award of attorneys' fees was in error. *Raleigh Fed. Sav. Bank v. Godwin*, 99 N.C. App. 761, 394 S.E.2d 294 (1990).

There was sufficient evidence to support award of attorneys' fee of \$24,308.00 where the award was supported by the affidavit of plaintiff's attorney, and billing statements showing the actual work performed and the attorneys' hourly rates, and the trial court

made findings of fact as to the reasonable amount of time required for the services and the reasonableness of the hourly rates. *Barker v. Agee*, 93 N.C. App. 537, 378 S.E.2d 566 (1989), rev'd on other grounds, 326 N.C. 470, 389 S.E.2d 803 (1990).

Attorney's Fees Provision in Credit Agreement Held Enforceable.

— Where, although no supporting affidavit was presented, there was a formal credit agreement which provided for reasonable attorney's fees for the collection of past due debts, and the trial court had before it the pleadings, depositions, and interrogatories, enabling it to make a determination as to the extent of work performed by counsel and the reasonableness of the fees assessed, the attorney's fees provision was legally enforceable. *Institution Food House, Inc. v. Circus Hall of Cream, Inc.*, 107 N.C. App. 552, 421 S.E.2d 370 (1992).

Recovery of Percentage of Outstanding Balance. — Where contract

provided that owner would pay reasonable attorneys' fees incurred by the contractor for the collection of any defaulted payment, under the provisions of this section, contractor could recover as attorneys' fees 15% of the "outstanding balance" due on the contract. *G.L. Wilson Bldg. Co. v. Thorneburg Hosiery Co.*, 85 N.C. App. 684, 355 S.E.2d 815, cert. denied, 320 N.C. 798, 361 S.E.2d 75 (1987).

Applied in *Lawrence v. Wetherington*, 108 N.C. App. 543, 423 S.E.2d 829 (1993).

Cited in *Merritt v. Knox*, 94 N.C. App. 340, 380 S.E.2d 160 (1989); *Thorneburg Hosiery Co. v. G.L. Wilson Bldg. Co.*, 94 N.C. App. 769, 381 S.E.2d 718 (1989); *First Am. Bank v. Carley Capital Group*, 99 N.C. App. 667, 394 S.E.2d 237 (1990); *West End III Ltd. Partners v. Lamb*, 102 N.C. App. 458, 402 S.E.2d 472 (1991); *Pinnacle Group, Inc. v. Shrader*, 105 N.C. App. 168, 412 S.E.2d 117 (1992).

§ 6-21.3. Remedies for returned check.

(a) Notwithstanding any criminal sanctions that may apply, a person, firm, or corporation who knowingly draws, makes, utters, or issues and delivers to another any check or draft drawn on any bank or depository that refuses to honor the same because the maker or drawer does not have sufficient funds on deposit in or credit with the bank or depository with which to pay the check or draft upon presentation, and who fails to pay the same amount, any service charges imposed on the payee by a bank or depository for processing the dishonored check, and any processing fees imposed by the payee pursuant to G.S. 25-3-512 in cash to the payee within 30 days following written demand therefor, shall be liable to the payee (i) for the amount owing on the check, the service charges, and processing fees and (ii) for additional damages of three times the amount owing on the check, not to exceed five hundred dollars (\$500.00) or to be less than one hundred dollars (\$100.00). In an action under this section the court or jury may, however, waive all or part of the additional damages upon a finding that the defendant's failure to satisfy the dishonored check or draft was due to economic hardship.

The written demand shall: (i) describe the check or draft and the circumstances of its dishonor, (ii) contain a demand for payment and a notice of intent to file suit for the amount owing on the check, the service charges, and processing fees, and additional damages up to five hundred dollars (\$500.00) under this section if payment is not received within 30 days, and (iii) be mailed by certified mail to the defendant at his last known address.

(b) In an action under subsection (a) of this section, the presiding judge or magistrate may award the prevailing party, as part of the court costs payable, a reasonable attorney's fee to the duly licensed attorney representing the prevailing party in such suit.

(c) It shall be an affirmative defense, in addition to other defenses, to an action under this section if it is found that: (i) full satisfaction of the amount of the check or draft was made prior to the commencement of the action, or (ii) that the bank or depository erred in dishonoring the check or draft, or (iii) that the acceptor of the check knew at the time of acceptance that there were insufficient funds on deposit in the bank or depository with which to cause the check to be honored.

(d) The remedy provided for herein shall apply only if the check was drawn, made, uttered or issued with knowledge there were insufficient funds in the account or that no credit existed with the bank or depository with which to pay the check or draft upon presentation. (1975, c. 129, s. 1; 1981, c. 781, s. 2; 1985, c. 643; 1993, c. 374, s. 1.)

Effect of Amendments. —

The 1993 amendment, effective December 1, 1993, and applicable to checks written on or after that date, in the first sentence of the first paragraph of subsection (a), inserted "any service charges imposed on the payee by a bank or depository for processing the dishonored check, and any processing fees imposed by the payee pursuant to G.S. 25-3-512" following "and who fails to pay the same amount"; inserted the clause (i) and (ii) designations; in present clause (i) substituted "the service charges, and processing fees and" for "check and, in addition"; in present clause (ii) substituted

"additional damages of" for "damages of the lesser of five hundred dollars (\$500.00) or," substituted "not to exceed five hundred dollars (\$500.00) or to be" for "but in no case" and deleted "in addition to the amount owing on the check" following "one hundred dollars (\$100.00)"; in the second sentence of the first paragraph, substituted "additional" for "treble"; and in the second paragraph substituted "the amount owing on the check, the service charges, and processing fees, and additional damages up to five hundred dollars (\$500.00)" for "treble damages."

§ 6-21.4. Allowance of counsel fees and costs in certain cases involving principals or teachers.

Legal Periodicals. —

For note, "A Public Goods Approach to Calculating Reasonable Fees Under At-

torney Fee Shifting Statutes," see 1989 Duke L.J. 438.

§ 6-21.5. Attorney's fees in nonjusticiable cases.

Legal Periodicals. — For note, "A Public Goods Approach to Calculating Reasonable Fees Under Attorney Fee

Shifting Statutes," see 1989 Duke L.J. 438.

CASE NOTES

The purpose of this statute is not served by treating those who bring frivolous suits against indigent parties differently from those who bring frivolous suits against parties who can afford to retain their own counsel; therefore, the trial court's limitation of the attorneys' fee award to the court-appointed rate of \$35.00 per hour was error. *Clark v. Wil-*

liamson, 91 N.C. App. 668, 373 S.E.2d 317 (1988).

Absence of Justiciable Issue. — To recover attorneys' fees under § 6-21.5, the party claiming attorney fees must be the "prevailing party," and there must be "a complete absence of a justiciable issue of either law or fact raised by the losing party in any pleading." *Bryson v.*

Sullivan, 102 N.C. App. 1, 401 S.E.2d 645 (1991), modified on other grounds, 330 N.C. 644, 412 S.E.2d 327 (1992).

The mere filing of an affirmative defense without more is not sufficient to establish the absence of a justiciable issue, nor is the grant of a § 1A-1, Rule 12(b)(6) motion, nor the entry of summary judgment. These events may only be evidence of the absence of a justiciable issue. However, action by the losing party which perpetuated litigation in the face of events substantially establishing that the pleadings no longer presented a justiciable controversy may also serve as evidence for purposes of § 6-21.5. *Sunamerica Fin. Corp. v. Bonham*, 328 N.C. 254, 400 S.E.2d 435 (1991).

When defendant's answer raising the statute of limitations defense was filed and served, it should have become apparent to plaintiff that, barring circumstances permitting the statute of limitations to be tolled, the complaint no longer contained a justiciable issue. *Sunamerica Fin. Corp. v. Bonham*, 328 N.C. 254, 400 S.E.2d 435 (1991).

Absence of Justiciable Controversy. — It is possible that a pleading which, when read alone set forth a justiciable controversy, may, when read with a responsive pleading, no longer present a justiciable controversy. *Sunamerica Fin. Corp. v. Bonham*, 328 N.C. 254, 400 S.E.2d 435 (1991).

Section Not Limited to Initial Pleadings. — The legislative purpose of this section is to discourage frivolous legal action, and that purpose may not be circumvented by limiting the section's application to initial pleadings. *Short v. Bryant*, 97 N.C. App. 327, 388 S.E.2d 205 (1990).

Strict Construction of This Section. — Because statutes awarding an attorneys' fee to the prevailing party are in derogation of the common law, this section must be strictly construed. *Sunamerica Fin. Corp. v. Bonham*, 328 N.C. 254, 400 S.E.2d 435 (1991).

Reasonable Attorneys' Fee. — Since this section authorizes the court to award "a reasonable attorney's fee," the trial court was not limited to the amount fixed by the district court in its payment of counsel appointed to indigent parties. *Clark v. Williamson*, 91 N.C. App. 668, 373 S.E.2d 317 (1988).

The only basis for the award of attorneys' fees under this section is the complete absence of a justiciable issue.

Bryant v. Short, 84 N.C. App. 285, 352 S.E.2d 245, cert. denied, 319 N.C. 458, 356 S.E.2d 2 (1987), upholding order awarding attorneys' fees.

Before a court may tax attorneys' fees against a losing party under § 6-21.5 based upon the complete absence of a justiciable legal issue, the prevailing party must provide proof that the losing party should reasonably have been aware of the complaint's legal deficiencies. *Bryson v. Sullivan*, 102 N.C. App. 1, 401 S.E.2d 645 (1991), modified on other grounds, 330 N.C. 644, 412 S.E.2d 327 (1992).

With regard to determining whether attorneys' fees may be awarded under this section, the first issue is whether the pleading, when read in conjunction with all the responsive pleadings, facially presents a justiciable issue of law. If not, the second issue is whether the losing party should reasonably have been aware that the pleading he filed contained no justiciable issue of law. *dePasquale v. O'Rahilly*, 102 N.C. App. 240, 401 S.E.2d 827 (1991).

Instead of acknowledging that the defendant's answer raised a virtually unassailable defense which foreclosed any reasonable expectation of an affirmative recovery by plaintiff, plaintiff forged on frivolously attempting to create a controversy. Under these facts the trial court could have found that such frivolous litigation constitutes a reckless waste of judicial resources as well as the time and money of the prevailing litigants. *Sunamerica Fin. Corp. v. Bonham*, 328 N.C. 254, 400 S.E.2d 435 (1991).

This section appears to be based on deterring frivolous and bad faith lawsuits by the use of attorneys' fees. *Daniels v. Montgomery Mut. Ins. Co.*, 81 N.C. App. 600, 344 S.E.2d 847 (1986), rev'd in part, aff'd in part, 320 N.C. 669, 360 S.E.2d 772 (1987).

"Justiciable issues" are those which are real and present, as opposed to imagined or fanciful. *Sprouse v. North River Ins. Co.*, 81 N.C. App. 311, 344 S.E.2d 555, cert. denied, 318 N.C. 284, 348 S.E.2d 344 (1986).

"Complete absence of a justiciable issue" suggests that it must conclusively appear that such issues are absent, even giving the losing party's pleadings the indulgent treatment which they receive on motions for summary judgment or to dismiss. *Sprouse v. North River Ins. Co.*, 81 N.C. App. 311,

344 S.E.2d 555, cert. denied, 318 N.C. 284, 348 S.E.2d 344 (1986).

Justiciable Issue Found. — Defendants were not entitled to attorney's fees because there was not a complete absence of a justiciable issue of either law or fact raised by plaintiffs' complaint even though the action was dismissed. *Brittain v. Cinnoca*, 111 N.C. App. 656, 433 S.E.2d 244 (1993).

Specific Findings Not Required Absent Justiciable Issue. — The sufficiency of a pleading is a question of law for the court, and the trial court need not make its findings more detailed if it states that the pleading raised no justiciable issue of law or fact. *Bryant v. Short*, 84 N.C. App. 285, 352 S.E.2d 245, cert. denied, 319 N.C. 458, 356 S.E.2d 2 (1987).

The granting of defendants' motion for summary judgment was not in itself a sufficient reason for the court's decision to award attorney's fees under this section; it could be evidence to support the court's decision to make such an award. *Brooks v. Giesey*, 334 N.C. 303, 432 S.E.2d 339 (1993).

Appeals. — Under a statute such as this section, which contains "prevailing party" requirement, the parties should not be required to litigate fees when the appeal could moot the issue. Furthermore, upon filing of a notice of appeal, a trial court in North Carolina is divested of jurisdiction with regard to all matters embraced within or affected by the judgment which is the subject of the appeal. *Brooks v. Giesey*, 106 N.C. App. 586, 418 S.E.2d 236 (1992), aff'd, 334 N.C. 303, 432 S.E.2d 339 (1993).

Award of attorneys' fees under this section held proper. *Sprouse v. North River Ins. Co.*, 81 N.C. App. 311, 344 S.E.2d 555, cert. denied, 318 N.C. 284, 348 S.E.2d 344 (1986); *Clark v. Williamson*, 91 N.C. App. 668, 373 S.E.2d 317 (1988).

Trial court's findings of fact and conclusions of law, which established that from the initiation of this suit, there was never any factual or legal basis for finding defendants liable for any alleged injury suffered by plaintiffs from purchase of real property, were sufficient to uphold order awarding defendants costs (including reasonable attorney's fees) under this section. *Brooks v. Giesey*, 334 N.C. 303, 432 S.E.2d 339 (1993).

Court's order that defendant pay legal fees incurred by executor after defendant's default at judicial sale of

estate's real and personal property held unauthorized. *Parker v. Lippard*, 87 N.C. App. 43, 359 S.E.2d 492, modified, 87 N.C. App. 487, 361 S.E.2d 395 (1987).

Fees Not Authorized Where Case Settled by Arbitration. — Where, although building owner filed complaint in civil court, case had already been submitted for arbitration and was settled by the award of the arbitrators, this section did not apply to authorize the trial court to award attorneys' fees incurred in the arbitration hearing; in order for the trial court to make such an award, the "civil action" or "special proceeding" providing the basis for the award must have been held before that tribunal or pursuant to its authority, and no order other than the order which placed the case in inactive status had been entered, nor had any action been taken in the superior court. *Thorneburg Hosiery Co. v. G.L. Wilson Bldg. Co.*, 94 N.C. App. 769, 381 S.E.2d 718 (1989).

Collateral Issues. — Attorneys' fee requests under § 1A-1, Rule 11 and § 6-21.5 raise collateral issues which often require consideration by the trial court after the action has been terminated, and a voluntary dismissal under § 1A-1, Rule 41(a) does not deprive the trial court of jurisdiction to determine these collateral issues. To hold otherwise would allow a litigant or attorney to purge his violation of Rule 11 or § 6-21.5 merely by taking a dismissal, and thereby lose all incentive to stop, think and investigate more carefully before serving and filing papers. *Bryson v. Sullivan*, 102 N.C. App. 1, 401 S.E.2d 645 (1991), modified on other grounds, 330 N.C. 644, 412 S.E.2d 327 (1992).

Voluntary Dismissal. — Where the plaintiffs filed a voluntary dismissal with prejudice pursuant to § 1A-1, Rule 41(a)(1), the trial court was not deprived of jurisdiction to determine the appropriateness of attorneys' fees under § 1A-1, Rule 11 or § 6-21.5. *Bryson v. Sullivan*, 102 N.C. App. 1, 401 S.E.2d 645 (1991), modified on other grounds, 330 N.C. 644, 412 S.E.2d 327 (1992).

Applied in *Harris v. Harris*, 93 N.C. App. 67, 376 S.E.2d 502 (1989); *Barnes v. Ford Motor Co.*, 95 N.C. App. 367, 382 S.E.2d 842 (1989); *K & K Dev. Corp. v. Columbia Banking Fed. Sav. & Loan Ass'n*, 96 N.C. App. 474, 386 S.E.2d 226 (1989).

Quoted in *Tittle v. Case*, 101 N.C. App. 346, 399 S.E.2d 373 (1991).

Cited in *T'ai Co. v. Market Square*

Ltd. Partnership, 92 N.C. App. 234, 373 S.E.2d 885 (1988); *Nichols v. Carolina Tel. & Tel. Co.*, 93 N.C. App. 503, 378 S.E.2d 230 (1989); *Tay v. Flaherty*, 100

N.C. App. 51, 394 S.E.2d 217 (1990); *Smith v. McDonald*, 767 F. Supp. 732 (M.D. N.C. 1991); *Freese v. Smith*, 110 N.C. App. 28, 428 S.E.2d 841 (1993).

§ 6-24. Suits by an indigent; payment of costs by an indigent.

A person who sues as an indigent is not required to advance the required court costs and no officer shall require any fee of the person. If a court enters a judgment in favor of a person suing as an indigent and does not require another party to the suit to pay the costs of the suit, the court may require the indigent person to pay any costs of the suit that were not required to be paid because the person was indigent. (1868-9, c. 96, s. 3; Code, s. 212; 1895, c. 149; Rev., s. 1265; C.S., s. 1247; 1993, c. 435, s. 5.)

Effect of Amendments. — The 1993 amendment, effective October 1, 1993, and applicable to all suits or appeals prosecuted on or after that date, in the section catchline substituted "by an indigent; payment of costs by an indigent"

for "in forma pauperis, no costs unless recovery," and rewrote the section, which formerly read "When any person sues as a pauper, no officer shall require of him any fee, and he shall recover no costs, except in case of recovery by him."

Chapter 7A.

Judicial Department.

SUBCHAPTER I. GENERAL COURT OF JUSTICE.

Sec.

Article 1B.

Age Limits for Service as Justice or Judge.

Sec.

7A-4.20. Age limit for service as justice
or judge: exception.

SUBCHAPTER II. APPELLATE DIVISION OF THE GEN- ERAL COURT OF JUSTICE.

Article 5.

Jurisdiction.

7A-29. (Effective until October 1, 1995)
Appeals of right from cer-
tain administrative agen-
cies.

7A-29. (Effective October 1, 1995) Ap-
peals of right from certain
administrative agencies.

7A-37. [Repealed.]

7A-38. Court ordered, mediated settle-
ment conferences in supe-
rior court civil actions.

7A-39. [Reserved.]

SUBCHAPTER III. SUPERIOR COURT DIVISION OF THE GENERAL COURT OF JUSTICE.

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Organization.

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7A-45.2. Emergency special judges of
the superior court; quali-
fications, appointment, re-
moval, and authority.

Article 8.

Retirement of Judges of the Superior Court; Retirement Compensation for Superior Court Judges; Recall to Emergency Service of Judges of the Dis- trict and Superior Court; Disability Retirement for Judges of the Superior Court.

7A-52. Retired district and superior

court judges may become
emergency judges subject
to recall to active service;
compensation for emer-
gency judges on recall.

Article 9.

District Attorneys and Judicial Districts.

7A-60. (For effective date see note) Dis-
trict attorneys and prosecu-
torial districts.

7A-69. Investigatorial assistants.

Article 12.

Clerk of Superior Court.

7A-101. Compensation.

7A-102. Assistant and deputy clerks;
appointment; number; sal-
aries; duties.

7A-112. (See editor's note for date
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funds in clerk's hands.

SUBCHAPTER IV. DISTRICT COURT DIVISION OF THE GENERAL COURT OF JUSTICE.

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Creation and Organization of the District Court Division.

7A-133. (See editor's note) Numbers of
judges by districts; num-
bers of magistrates and ad-
ditional seats of court, by
counties.

Article 14.

District Judges.

7A-142. Vacancies in office.

7A-144. Compensation.

7A-146. Administrative authority and
duties of chief district
judge.

7A-148. Annual conference of chief dis-
trict judges.

Article 16.

Magistrates.

7A-171.1. Duty hours, salary, and
travel expenses within
county.

Sec.

7A-171.2. Qualifications for nomination or renomination.

Article 17.

Clerical Functions in the District Court.

7A-180. Functions of clerk of superior court in district court matters.

Article 19.

Small Claim Actions in District Court.

7A-210. Small claim action defined.

7A-219. Certain counterclaims; cross claims; third-party claims not permissible.

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SUBCHAPTER V. JURISDICTION AND POWERS OF THE TRIAL DIVISIONS OF THE GENERAL COURT OF JUSTICE.

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SUBCHAPTER VI. REVENUES AND EXPENSES OF THE JUDICIAL DEPARTMENT.

Article 28.

Uniform Costs and Fees in the Trial Divisions.

Sec.

7A-304. Costs in criminal actions.

7A-305. Costs in civil actions.

7A-306. Costs in special proceedings.

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SUBCHAPTER VII. ADMINISTRATIVE MATTERS.

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Administrative Office of the Courts.

7A-343.1. Distribution of copies of the appellate division reports.

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7A-346.1. Dispute Settlement Center Reports.

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7A-465. Public defender; defender districts; qualifications; compensation.

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Sec.

7A-467. Assistant defenders; assigned counsel.

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**SUBCHAPTER X. NORTH
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**North Carolina Courts Commis-
sion.**

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7A-543. Duty to report child abuse, neglect, dependency, or death due to maltreatment.

7A-544. Investigation by Director; access to confidential information; notification of person making the report.

7A-544.1. Interference with investigation.

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7A-548. Duty of Director to report evidence of abuse, neglect; investigation by local law enforcement; notification of Department of Human Resources and State Bureau of Investigation.

7A-550. Immunity of persons reporting and cooperating in an investigation.

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Article 46.

**Temporary Custody; Secure and
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7A-571. Taking a juvenile into temporary custody.

7A-572. Duties of person taking juvenile into temporary custody.

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Article 47.

Basic Rights.

7A-586. Appointment and duties of guardian ad litem.

7A-588. Payment of court appointed attorney or guardian ad litem.

Article 48.

**Law-Enforcement Procedures in
Delinquency Proceedings.**

7A-601. Destruction of records resulting from nontestimonial identification procedures.

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Transfer to Superior Court.

7A-608. Transfer of jurisdiction of juvenile to superior court.

7A-609. Probable-cause hearing.

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Dispositions.

7A-647. Dispositional alternatives for delinquent, undisciplined, abused, neglected, or dependent juvenile.

7A-649. Dispositional alternatives for delinquent juvenile.

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7A-652. Commitment of delinquent juvenile to Division of Youth Services.

7A-659. Post termination of parental rights' placement court review.

7A-660. Review of agency's plan for child placement.

Sec.

7A-661. Review of voluntary foster care placements.

Article 54.

Juvenile Records and Social Reports.

7A-675. Confidentiality of records.

7A-676. Expunction of records of juveniles alleged or adjudicated delinquent and undisciplined.

Article 58.

Juvenile Law Study Commission.

7A-740. Creation; members; terms; qualifications; vacancies.

SUBCHAPTER XII. ADMINISTRATIVE HEARINGS.

Article 60.

Office of Administrative Hearings.

7A-759. Role as deferral agency.

SUBCHAPTER XIII. COMMUNITY PENALTIES PROGRAM.

Article 61.

Community Penalties Program Act of 1983.

Sec.

7A-770. Purpose.

7A-771. Definitions.

7A-772. Allocation of funds.

7A-773. Responsibilities of a community penalties program.

7A-774. Requirements for a comprehensive community penalties program plan.

7A-775. Community penalties board.

7A-776. Limitation on use of funds.

7A-777. Evaluation.

§ 7A-1. Short title.

CASE NOTES

Method of Electing Superior Court Judges Held Constitutional. — The method of electing superior court judges does not infringe upon republicans' rights to free speech and association in

violation of the First Amendment. Republican Party v. Martin, 980 F.2d 943 (4th Cir. 1992), rehearing denied, 991 F.2d 1202 (4th Cir. 1993).

§ 7A-2. Purpose of Chapter.

CASE NOTES

Cited in State v. Pennington, 327 N.C. 89, 393 S.E.2d 847 (1990).

SUBCHAPTER I. GENERAL COURT OF JUSTICE.

ARTICLE 1B.

Age Limits for Service as Justice or Judge.

§ 7A-4.20. Age limit for service as justice or judge: exception.

No justice or judge of the General Court of Justice may continue

in office beyond the last day of the month in which he attains his seventy-second birthday, but justices and judges so retired may be recalled for periods of temporary service as provided in Subchapters II and III of this chapter. (1971, c. 508, s. 1; c. 1194; 1973, c. 248; 1977, c. 736, s. 5; 1981, c. 455, s. 1; 1991 (Reg. Sess., 1992), c. 873, s. 1.)

Effect of Amendments. — The 1991 (Reg. Sess., 1992) amendment, effective July 7, 1992, and applicable to judges or justices retiring on or after that date, deleted “of the appellate division” following “No justice or judge”, and deleted “and no judge of the superior court or

district court division of the General Court of Justice may continue in office beyond the last day of the month in which he attains his seventieth birthday” following “in which he attains his seventy-second birthday”.

CASE NOTES

Stated in *Martin v. State*, 330 N.C.412, 410 S.E.2d 474 (1991).

SUBCHAPTER II. APPELLATE DIVISION OF THE GENERAL COURT OF JUSTICE.

ARTICLE 2.

Appellate Division Organization.

§ 7A-7. Law clerks; secretaries and stenographers.

CASE NOTES

Stated in *Thrift v. Food Lion, Inc.*, 111 N.C. App. 758, 433 S.E.2d 481 (1993).

ARTICLE 5.

Jurisdiction.

§ 7A-27. Appeals of right from the courts of the trial divisions.

CASE NOTES

- I. General Consideration.
- III. Final Judgments.
- IV. Interlocutory Orders.
 - A. Generally.
 - B. Particular Orders.

I. GENERAL CONSIDERATION.

There is no conflict between § 15A-1444(e) and subsection (a) of this section. *State v. Handy*, 326 N.C. 532, 391 S.E.2d 159 (1990).

An order is immediately appealable if the order affects a substantial right and the loss of that right will injure the party appealing if not corrected prior to final judgment. *Travco Hotels, Inc. v. Piedmont Natural Gas Co.*, 102 N.C. App. 659, 403 S.E.2d 593, *aff'd*, 332 N.C. 288, 420 S.E.2d 426 (1992).

Finality Requirement. — The statutes setting forth the appeals process do not include the same jurisdictional “finality” requirement as does the federal statute. *Goldston v. AMC*, 326 N.C. 723, 392 S.E.2d 735 (1990).

Section 1-277 and this section, considered together, provide that no appeal lies to an appellate court from an interlocutory judgment unless that ruling deprives the appellant of a substantial right which it would lose if the ruling were not reviewed before final judgment. *State ex rel. Employment Sec. Comm’n v. IATSE Local 574*, 114 N.C. App. 662, 442 S.E.2d 339 (1994).

There was no “substantial interest” exception present to permit appeal under § 1-277 and this section of a court’s order denying defendant’s summary judgment. *Cagle v. Teachy*, 111 N.C. App. 244, 431 S.E.2d 801 (1993).

Applied in *Wilson Heights Church of God v. Autry*, 94 N.C. App. 111, 379 S.E.2d 691 (1981); *Hooper v. C.M. Steel, Inc.*, 94 N.C. App. 567, 380 S.E.2d 593 (1989); *Howard v. Parker*, 95 N.C. App. 361, 382 S.E.2d 808 (1989); *Vinson v. Wallace*, 96 N.C. App. 372, 385 S.E.2d 810 (1989); *Looney v. Wilson*, 97 N.C. App. 304, 388 S.E.2d 142 (1990); *Kimzey Winston-Salem, Inc. v. Jester*, 103 N.C. App. 77, 404 S.E.2d 176 (1991); *State v. McKinnon*, 328 N.C. 668, 403 S.E.2d 474 (1991); *Greer v. Parsons*, 103 N.C. App. 463, 405 S.E.2d 921 (1991); *Donnelly v. Guilford County*, 107 N.C. App. 289, 419 S.E.2d 365 (1992); *Bennish v. North Carolina Dance Theater, Inc.*, 108 N.C. App. 42, 422 S.E.2d 335 (1992).

Quoted in *Plummer v. Kearney*, 108 N.C. App. 310, 423 S.E.2d 526 (1992).

Stated in *Kaplan v. Prolife Action League*, 111 N.C. App. 1, 431 S.E.2d 828 (1993); *Milner Airco, Inc. v. Morris*, 111 N.C. App. 866, 433 S.E.2d 811 (1993).

Cited in *In re Guess*, 95 N.C. App. 435, 382 S.E.2d 459 (1989); *State v. Bridges*, 325 N.C. 529, 385 S.E.2d 337

(1989); *State v. Coker*, 325 N.C. 686, 386 S.E.2d 196 (1989); *State v. Davis*, 325 N.C. 607, 386 S.E.2d 418 (1989); *State v. Melvin*, 326 N.C. 173, 388 S.E.2d 72 (1990); *Crist v. Moffatt*, 326 N.C. 326, 389 S.E.2d 41 (1990); *Kirkman v. Wilsson*, 98 N.C. App. 242, 390 S.E.2d 698 (1990); *Crowell Constructors, Inc. v. State ex rel. Cobey*, 99 N.C. App. 431, 393 S.E.2d 312 (1990); *State v. Richardson*, 328 N.C. 505, 402 S.E.2d 401 (1991); *Telerent Leasing Corp. v. Barbee*, 102 N.C. App. 129, 401 S.E.2d 122 (1991); *State v. Terry*, 329 N.C. 191, 404 S.E.2d 658 (1991); *State v. Weddington*, 329 N.C. 202, 404 S.E.2d 671 (1991); *Peoples Sav. & Loan Assoc. v. Citicorp Acceptance Co.*, 103 N.C. App. 762, 407 S.E.2d 251 (1991); *State v. Heatwole*, 333 N.C. 156, 423 S.E.2d 735 (1992); *State v. Pope*, 333 N.C. 106, 423 S.E.2d 740 (1992); *State v. Pope*, 333 N.C. 116, 423 S.E.2d 746 (1992); *State v. Williamson*, 333 N.C. 128, 423 S.E.2d 766 (1992); *State v. Bronson*, 333 N.C. 67, 423 S.E.2d 772 (1992); *T.H. Blake Contracting Co. v. Sorrells*, 109 N.C. App. 119, 426 S.E.2d 85 (1993); *In re Huang*, 110 N.C. App. 683, 431 S.E.2d 541 (1993); *McNeil v. Hicks*, 111 N.C. App. 262, 431 S.E.2d 868 (1993); *State v. Harvell*, 334 N.C. 356, 432 S.E.2d 125 (1993); *State v. Collins*, 335 N.C. 729, 440 S.E.2d 559 (1994); *Gunter v. Anders*, 114 N.C. App. 61, 441 S.E.2d 167 (1994); *State v. Barton*, 335 N.C. 696, 441 S.E.2d 295 (1994); *Adams v. Jones*, 114 N.C. App. 256, 441 S.E.2d 699 (1994); *State v. Howell*, 335 N.C. 457, 439 S.E.2d 116 (1994); *State v. Lee*, 335 N.C. 244, 439 S.E.2d 547 (1994); *State v. Patterson*, 335 N.C. 437, 439 S.E.2d 578 (1994); *State v. Green*, 336 N.C. 142, 443 S.E.2d 14 (1994); *State v. Jones*, 336 N.C. 229, 443 S.E.2d 48 (1994).

III. FINAL JUDGMENTS.

Order Was Final Judgment Despite Reserving Issue for Jury. — Where the trial court in its “order and partial summary judgment” reserved for the jury the “issue as to whether defendant has waived any objection to, or is estopped to deny, the tenant’s renewal of the lease,” the order left no further action for the trial court to dispose of the case. Although the order reserved an issue for the jury, the trial court determined that it was irrelevant whether notice was received; therefore, there was no requirement for a trial on the issues

of waiver or estoppel, and the order was effectively a final judgment and affected a substantial right. *Janus Theatres of Burlington, Inc. v. Aragon*, 104 N.C. App. 534, 410 S.E.2d 218 (1991).

IV. INTERLOCUTORY ORDERS.

A. Generally.

When Interlocutory Order Is Appealable Generally. —

For an interlocutory order to be immediately appealable under North Carolina law, it must: (1) affect a substantial right, and (2) work injury if not corrected before final judgment. *Goldston v. AMC*, 326 N.C. 723, 392 S.E.2d 735 (1990).

Trial court's dismissal of plaintiffs' claims against aircraft manufacturer affected a substantial right to have determined in a single proceeding, i.e., whether plaintiffs were damaged by the actions of one, some or all defendants where their claims arise upon the same series of transactions, and the appeal from an interlocutory order was considered. *Driver v. Burlington Aviation, Inc.*, 110 N.C. App. 519, 430 S.E.2d 476 (1993).

An interlocutory order not appealable under Rule 54(b) of the Rules of Civil Procedure may nevertheless be appealed pursuant to § 1-277 and subsection (d) of this section which permit an appeal of an interlocutory order which (1) affects a substantial right, or (2) in effect determines the action and prevents a judgment from which appeal might be taken, or (3) discontinues the action, or (4) grants or refuses a new trial. *Dalton Moran Shook, Inc. v. Pitt Dev. Co.*, 113 N.C. App. 707, 440 S.E.2d 585 (1994).

Particular Facts and Procedural History Must Be Considered. — In determining which interlocutory orders are appealable and which are not, the Supreme Court must consider the particular facts of each case and the procedural history of the order from which an appeal is sought. *Travco Hotels, Inc. v. Piedmont Natural Gas Co.*, 332 N.C. 288, 420 S.E.2d 426 (1992).

In deciding whether an appeal is interlocutory, § 1-277 and this section require a two-part test: (1) does the trial court's order affect a substantial right; and (2) if so, will the loss of that right injure the party appealing if it is not corrected prior to final judgment. *Travco Hotels, Inc. v. Piedmont Natural Gas Co.*, 102 N.C. App. 659, 403 S.E.2d 593,

aff'd, 332 N.C. 288, 420 S.E.2d 426 (1992).

The "substantial right" test, etc. —

The appealability of interlocutory orders pursuant to the "substantial right" exception is determined by a two-step test. The right itself must be substantial and the deprivation of that substantial right must potentially work injury to plaintiff if not corrected before appeal from final judgment. *Miller v. Swann Plantation Dev. Co.*, 101 N.C. App. 394, 399 S.E.2d 137 (1991).

Awards Pendente Lite. — Awards pendente lite are interlocutory decrees which necessarily do not affect a substantial right from which lies an immediate appeal pursuant to this section. *Browne v. Browne*, 101 N.C. App. 617, 400 S.E.2d 736 (1991).

Possibility of Two Trials. — The right to avoid the possibility of two trials on the same issues can be a substantial right so as to warrant an immediate appeal under § 1-277 and subsection (d) of this section. *Dalton Moran Shook, Inc. v. Pitt Dev. Co.*, 113 N.C. App. 707, 440 S.E.2d 585 (1994).

Where dismissal of appeal as interlocutory could result in two different trials on the same issues, creating the possibility of inconsistent verdicts, a substantial right was prejudiced; therefore, defendant's motion for summary judgment which was granted by the trial court was immediately appealable by plaintiff. *Hartman v. Walkertown Shopping Ctr., Inc.*, 113 N.C. App. 632, 439 S.E.2d 787 (1994).

B. Particular Orders.

Immunity as Basis for Summary Adjudication. — Denial of a motion to dismiss or for summary judgment is interlocutory and not immediately appealable. However, recent case law clearly establishes that if immunity is raised as a basis in the motion for summary adjudication, a substantial right is affected and the denial is immediately appealable. *EEE-ZZZ Lay Drain Co. v. North Carolina Dep't of Human Resources*, 108 N.C. App. 24, 422 S.E.2d 338 (1992).

Possibility of Inconsistent Verdicts. — Plaintiffs' appeal is reviewable under the substantial right exception where a dismissal would raise the possibility of inconsistent verdicts in later proceedings. *Hoots v. Pryor*, 106 N.C. App. 397, 417 S.E.2d 269, cert. denied, 332 N.C. 344, 421 S.E.2d 148 (1992).

Order Granting Summary Judgment. —

Appeal from the grant of summary judgment for a psychiatric hospital in a medical malpractice action against the hospital and independent contractor physicians was premature, where the remaining defendants had separate and distinct contracts and each owed a different duty to the patient. *Myers v. Barringer*, 101 N.C. App. 168, 398 S.E.2d 615 (1990).

Appeal of Order of Summary Judgment. — Where dismissal of an appeal of a summary judgment could result in two different trials on the same issues, thereby creating the possibility of inconsistent verdicts, a substantial right is prejudiced and the summary judgment is immediately appealable. *Taylor v. Brinkman*, 108 N.C. App. 767, 425 S.E.2d 429, cert. denied, 333 N.C. 795, 431 S.E.2d 30 (1993).

Denial of a motion for summary judgment based on the defense of res judicata may affect a substantial right, making the order immediately appealable. *Bockweg v. Anderson*, 333 N.C. 486, 428 S.E.2d 157 (1993).

Order Granting Partial Summary Judgment. —

Where plaintiff claimed that defendants, husband and wife, were negligent, and where summary judgment was granted in favor of wife, and where a possibility existed that inconsistent verdicts would be rendered in separate trials on the issue of husband and wife's joint and concurrent negligence if plaintiff's appeal ultimately was successful, judgment was appealable because it affected a substantial right of plaintiff to have determined, in a single action, the question of whether plaintiff was injured by the acts of one, both, or neither of the defendants, especially since the claims against them arose from the same series of events. *DeHaven v. Hoskins*, 95 N.C. App. 397, 382 S.E.2d 856, cert. denied, 325 N.C. 705, 388 S.E.2d 452 (1989).

Appeal of Order Denying Partial Summary Judgment. — Defendant's appeal of an order denying its motion for partial summary judgment on the issue of punitive damages was interlocutory. *Travco Hotels, Inc. v. Piedmont Natural Gas Co.*, 102 N.C. App. 659, 403 S.E.2d 593, aff'd, 332 N.C. 288, 420 S.E.2d 426 (1992).

Interlocutory summary judgments in favor of third-party and fourth-party defendants in a negligence ac-

tion were appealable as to the question of negligence, which presented common factual issues with the remaining claim of plaintiff against defendant, but not as to the issue of indemnity, which did not. *Britt v. American Hoist & Derrick Co.*, 97 N.C. App. 442, 388 S.E.2d 613 (1990).

Arbitration Order. — An order denying arbitration, although interlocutory, is immediately appealable because it involves a substantial right which might be lost if appeal is delayed. In accord with 1993 Cumulative Supplement. See *Hackett v. Bonta*, 113 N.C. App. 89, 437 S.E.2d 687 (1993).

Arbitration. —

Order compelling arbitration was interlocutory and did not affect a substantial right. *North Carolina Elec. Membership Corp. v. Duke Power Co.*, 95 N.C. App. 123, 381 S.E.2d 896, cert. denied, 325 N.C. 709, 388 S.E.2d 461 (1989).

Order Appointing Guardian Ad Litem. — For plaintiff to have been entitled to appeal of right from order granting defendant's motions for the appointment of a guardian ad litem, plaintiff was required to establish that it either (1) affected a substantial right, or (2) in effect determined the action and prevented a judgment from which appeal might be taken, or (3) discontinued the action, or (4) granted or refused a new trial. *Culton v. Culton*, 327 N.C. 624, 398 S.E.2d 323 (1990).

Preliminary Injunction Against Operation of Business. — Defendant could appeal trial court's issuance of a preliminary injunction enjoining defendant from operating a used car lot in violation of plaintiff town's zoning ordinance, where although defendant's appeal was from an interlocutory order, defendant would have been deprived of a substantial right, the right to operate his business, absent a review prior to determination on the merits. *Town of Knightdale v. Vaughn*, 95 N.C. App. 649, 383 S.E.2d 460 (1989).

Preliminary Injunction Pursuant to Covenant Not to Compete. —

In an action for injunctive relief and damages based on alleged breach of a covenant not to compete, defendant's appeal of trial court's preliminary injunction barring him from participating in any employment that competed with plaintiff's business in certain geographic locations would be dismissed as interlocutory, where there was no evidence in the record to show that defendant was presently working in any of those areas,

as the injunction did not deprive defendant of any substantial right which he would lose absent a review prior to final determination. *Automated Data Sys. v. Myers*, 96 N.C. App. 624, 386 S.E.2d 432 (1989).

Order Requiring Posting of Bond.

— Where brothers were equal shareholders in company, and company could no longer be conducted to the advantage of both of the shareholders, and where judge ordered the brothers to post a secured bond to ensure compliance with any judgment rendered, the appeal of the order by one of the brothers was interlocutory and would be dismissed; no substantial right of his was affected, since the amount of the bond reasonably approximated the value of the assets in his possession, and the bond would be cancelled if the opposing brother was unsuccessful in obtaining judgment in his favor. *Stancil v. Stancil*, 94 N.C. App. 760, 381 S.E.2d 720 (1989).

Order Removing Attorney.

— Plaintiff had a substantial right to have attorney of her choice, properly admitted pro hac vice under § 84-4.1, represent her in her lawsuit, and order removing him as counsel affected a substantial right of the plaintiff and was immediately appealable. *Goldston v. AMC*, 326 N.C. 723, 392 S.E.2d 735 (1990).

Denial of Motion to Disqualify Counsel.

— An order granting disqualification of counsel seriously disrupts the progress of litigation while new counsel is obtained, but one refusing such relief merely allows the action to proceed and has no permanent effect of any kind. *Travco Hotels, Inc. v. Piedmont Natural Gas Co.*, 332 N.C. 288, 420 S.E.2d 426 (1992).

Where trial court's entry of summary judgment against plaintiff included an award of attorneys' fees, it affected a substantial right; consequently, the order was immediately appealable pursuant to § 1-277(a) and subsection (d) of this section. *K & K Dev. Corp. v. Columbia Banking Fed. Sav. & Loan Ass'n*, 96 N.C. App. 474, 386 S.E.2d 226 (1989).

Order Barring Defendant from Equitable Distribution. — Trial court's order denying defendant's motion to amend his answer in divorce action, which he filed following grant of absolute divorce to plaintiff, had the effect of forever barring defendant from asserting a claim for equitable distribution, and thus affected a substantial right; it

was therefore appealable as a matter of right. *Goodwin v. Zeydel*, 96 N.C. App. 670, 387 S.E.2d 57 (1990).

Order Dismissing Equitable Distribution Claim. — Given the factual issues overlapping husband's company's contract claim retained by the court and wife's equitable distribution counterclaim which it dismissed, wife could appeal the dismissal of the equitable distribution counterclaim as a matter of right, since a substantial right would otherwise be affected. *Small v. Small*, 93 N.C. App. 614, 379 S.E.2d 273, cert. denied, 325 N.C. 273, 384 S.E.2d 519 (1989).

Appeal of Order Denying Motion to Disqualify Opponent's Counsel.

— Where defendant maintained that because law firm representing plaintiff represented defendant in previous matters of a similar nature (but not involving plaintiff), that firm could not represent plaintiff in the present matter, it did have a substantial right to prevent prior counsel from using confidential information gleaned from a prior representation and utilizing it against the client in subsequent litigation, however, it cannot be found that the deprivation of this right would injure defendant if not corrected before a final judgment, and defendant's appeal of the trial court's order denying its motion to disqualify law firm was interlocutory. *Travco Hotels, Inc. v. Piedmont Natural Gas Co.*, 102 N.C. App. 659, 403 S.E.2d 593, aff'd, 332 N.C. 288, 420 S.E.2d 426 (1992).

Appeal of Order Denying Release of Escrow Funds.

— The effect of an order denying the release of the funds held in escrow under § 58-36-25 was temporary and not permanent where the Commissioner's order only determined that the funds are not to be released now, and did not purport to determine who is entitled to the money; for these reasons, an appeal of the order was interlocutory and was not immediately appealable under either § 1A-1, Rule 54(b) or § 1-277 or this section. *State ex rel. Comm'r of Ins. v. North Carolina Rate Bureau*, 102 N.C. App. 809, 403 S.E.2d 597 (1991).

Judgment that Leaves Issue of Damages Unresolved.

— A judgment that determines only that there has in fact been a breach by defendant and leaves unresolved the issue of plaintiffs' damage is clearly an interlocutory order; an order determining only the issue of liability and leaving unresolved other is-

sues such as that of damages cannot be held to affect a substantial right. John-

ston v. Royal Indem. Co., 107 N.C. App. 624, 421 S.E.2d 170 (1992).

§ 7A-28. Decisions of Court of Appeals on post-trial motions for appropriate relief final or valuation of exempt property.

CASE NOTES

New Trial Based Upon Newly Discovered Evidence. — The State has the right to immediately appeal a superior court order granting a criminal defendant a new trial pursuant to § 15A-1415(b)(6), on the ground of

newly discovered evidence. *State v. Monroe*, 330 N.C. 433, 410 S.E.2d 913 (1991).

Cited in *McLendon v. Woodard*, 719 F. Supp. 441 (W.D.N.C. 1989).

§ 7A-29. (Effective until October 1, 1995) Appeals of right from certain administrative agencies.

(a) From any final order or decision of the North Carolina Utilities Commission not governed by subsection (b) of this section, the Department of Human Resources under G.S. 131E-188(b), the Commissioner of Banks under Articles 17, 18, 18A, and 21 of Chapter 53 of the General Statutes, the Administrator of Savings and Loans under Article 3A of Chapter 54B of the General Statutes, the North Carolina Industrial Commission, the North Carolina State Bar under G.S. 84-28, the Property Tax Commission under G.S. 105-290 and G.S. 105-342, the Commissioner of Insurance under G.S. 58-2-80, or the Secretary of Environment, Health, and Natural Resources under G.S. 104E-6.2, appeal as of right lies directly to the Court of Appeals.

(b) From any final order or decision of the Utilities Commission in a general rate case, appeal as of right lies directly to the Supreme Court. (1967, c. 108, s. 1; 1971, c. 703, s. 5; 1975, c. 582, s. 12; 1979, c. 584, s. 1; 1981, c. 704, s. 28; 1983, c. 526, s. 1; c. 761, s. 188; 1983 (Reg. Sess., 1984), c. 1000, s. 2; c. 1087, s. 2; c. 1113, s. 2; 1985, c. 462, s. 3; 1987, c. 850, s. 2; 1991, c. 546, s. 2; c. 679, s. 2; 1993, c. 501, s. 2.)

Section Set Out Twice. — The section above is effective until October 1, 1995. For the section as amended effective October 1, 1995, see the following section, also numbered § 7A-29.

Editor's Note. — Session Laws 1991, c. 546, which amended this section, in s. 3 provides: "This act becomes effective October 1, 1995. No reverse mortgage loan may be made on or after the date the act expires. The expiration of the act does not affect the validity of a reverse mortgage loan made before the date of expiration."

Effect of Amendments. — Session

Laws 1991, c. 546, s. 2, effective October 1, 1991, in subsection (a) substituted "under" for "pursuant to" throughout the subsection, substituted "17, 18, and 21" for "17 and 18" near the beginning of the subsection, and deleted "the Board of State Contract Appeals pursuant to G.S. 143-135.9" following "105-342". As to the expiration of this amendment, see the Editor's Note.

Session Laws 1991, c. 679, s. 2, effective October 1, 1991, in subsection (a) as amended by Chapter 546 of the 1991 Session Laws, inserted "of this section", inserted "18A", and inserted "G.S." preceding "105-342." Although Session

Laws 1991, c. 546 contains an expiration provision, quoted in the Editor's Note above, c. 679 contains no such provision.

The 1993 amendment, effective July 23, 1993, in subsection (a) deleted "or an appeal from" preceding "the Commis-

sioner of Insurance," and substituted "or the Secretary of Environment, Health, and Natural Resources under G.S. 104E-6.2" for "or from the Governor's Waste Management Board under G.S. 130A-293 and G.S. 104E-6.2."

CASE NOTES

Applied in *Hardin v. Venture Constr. Co.*, 107 N.C. App. 758, 421 S.E.2d 601 (1992); *Martin v. Piedmont Asphalt & Paving Co.*, 113 N.C. App. 121, 437 S.E.2d 696 (1993).

Cited in *State ex rel. Utils. Comm'n v.*

Thornburg, 325 N.C. 463, 385 S.E.2d 451 (1989); *State ex rel. Utils. Comm'n v. Thornburg*, 325 N.C. 484, 385 S.E.2d 463 (1989); *State ex rel. Utils. Comm'n v. Carolina Water Serv., Inc.*, 335 N.C. 493, 439 S.E.2d 127 (1994).

§ 7A-29. (Effective October 1, 1995) Appeals of right from certain administrative agencies.

(a) From any final order or decision of the North Carolina Utilities Commission not governed by subsection (b) of this section, the Department of Human Resources pursuant to G.S. 131E-188(b), the Commissioner of Banks pursuant to Articles 17 and 18, [and] 18A, of Chapter 53 of the General Statutes, the Administrator of Savings and Loans pursuant to Article 3A of Chapter 54B of the General Statutes, the North Carolina Industrial Commission, the North Carolina State Bar pursuant to G.S. 84-28, the Property Tax Commission pursuant to G.S. 105-290 and G.S. 105-342, the Board of State Contract Appeals pursuant to G.S. 143-135.9, the Commissioner of Insurance pursuant to G.S. 58-2-80, or the Secretary of Environment, Health, and Natural Resources under G.S. 104E-6.2, appeal as of right lies directly to the Court of Appeals.

(b) From any final order or decision of the Utilities Commission in a general rate case, appeal as of right lies directly to the Supreme Court. (1967, c. 108, s. 1; 1971, c. 703, s. 5; 1975, c. 582, s. 12; 1979, c. 584, s. 1; 1981, c. 704, s. 28; 1983, c. 526, s. 1; c. 761, s. 188; 1983 (Reg. Sess., 1984), c. 1000, s. 2; c. 1087, s. 2; c. 1113, s. 2; 1985, c. 462, s. 3; 1987, c. 850, s. 2; 1991, c. 546, s. 2; c. 679, s. 2; 1993, c. 501, s. 2.)

Section Set Out Twice. — The section above is effective October 1, 1995. For this section as in effect until October 1, 1995, see the preceding section, also numbered § 7A-29.

Editor's Note. — Session Laws 1991, c. 546, which amended this section, in s. 3 provides: "This act becomes effective October 1, 1991. This act expires October 1, 1995. No reverse mortgage loan may be made on or after the date the act

expires. The expiration of the act does not affect the validity of a reverse mortgage loan made before the date of expiration."

The section set out above is amended by Session Laws 1991, c. 679, s. 2 and by Session Laws 1993, c. 501, s. 2.

The word "and" in brackets in the first sentence of subsection (a) was inserted at the direction of the Revisor of Statutes.

§ 7A-30. Appeals of right from certain decisions of the Court of Appeals.

CASE NOTES

I. In General.

III. Dissent.

I. IN GENERAL.

Applied in *Medlin v. Bass*, 327 N.C. 587, 398 S.E.2d 460 (1990); *State v. Everett*, 328 N.C. 72, 399 S.E.2d 305 (1991).

Cited in *Turner v. Duke Univ.*, 325 N.C. 152, 381 S.E.2d 706 (1989); *State ex rel. Rhodes v. Simpson*, 325 N.C. 514, 385 S.E.2d 329 (1989); *State v. Davis*, 325 N.C. 693, 386 S.E.2d 187 (1989); *State v. Pakulski*, 326 N.C. 434, 390 S.E.2d 129 (1990); *Hogan v. Cone Mills Corp.*, 326 N.C. 476, 390 S.E.2d 136 (1990); *Thrash v. City of Asheville*, 327 N.C. 251, 393 S.E.2d 842 (1990); *Triangle Leasing Co. v. McMahon*, 327 N.C. 224, 393 S.E.2d 854 (1990); *McNeill v. Harnett County*, 327 N.C. 552, 398 S.E.2d 475 (1990); *Vancamp v. Burgner*, 328 N.C. 495, 402 S.E.2d 375 (1991); *Rogers v. T.J.X. Cos.*, 329 N.C. 226, 404 S.E.2d 664 (1991); *State v. Monroe*, 330 N.C. 433, 410 S.E.2d 913 (1991); *In re Michael Weinman Assocs.*, 333 N.C. 221, 424 S.E.2d 385 (1993); *Debnam v.*

North Carolina Dep't of Cor., 334 N.C. 380, 432 S.E.2d 324 (1993); *Gardner v. Gardner*, 334 N.C. 662, 435 S.E.2d 324 (1993); *Richmond County v. North Carolina Low-Level Radioactive Waste Mgt. Auth.*, 335 N.C. 77, 436 S.E.2d 113 (1993); *Baldwin v. GTE S., Inc.*, 335 N.C. 544, 439 S.E.2d 108 (1994); *Mitchell v. Nationwide Mut. Ins. Co.*, 335 N.C. 433, 439 S.E.2d 110 (1994).

III. DISSENT.

Waiver of Failure to Serve Notice of Appeal. — Failure to serve the notice of appeal is a defect in the record analogous to failure to serve process. Therefore, a party upon whom service of notice of appeal is required may waive the failure of service by not raising the issue by motion or otherwise and by participating without objection in the appeal, and the Court of Appeals thus had jurisdiction and could consider the case on its merits. *Hale v. Afro-American Arts Int'l, Inc.*, 335 N.C. 231, 436 S.E.2d 588 (1993).

§ 7A-31. Discretionary review by the Supreme Court.

CASE NOTES

Substantially Similar Rules and Procedures. — The rules and procedures of the North Carolina Supreme Court regarding writs of certiorari are substantially similar to those of the United States Supreme Court. *Felton v. Barnett*, 912 F.2d 92 (4th Cir. 1990), cert. denied, 498 U.S. 1032, 111 S. Ct. 693, 112 L. Ed. 2d 683 (1991).

Cited in *State ex rel. Rhodes v. Simpson*, 325 N.C. 514, 385 S.E.2d 329 (1989); *State ex rel. Martin v. Preston*, 325 N.C. 438, 385 S.E.2d 473 (1989); *Kiser v. Kiser*, 325 N.C. 502, 385 S.E.2d

487 (1989); *North Carolina State Bar v. Randolph*, 325 N.C. 699, 386 S.E.2d 185 (1989); *Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 388 S.E.2d 134 (1990); *State v. Wise*, 326 N.C. 476, 390 S.E.2d 142 (1990); *McNeill v. Harnett County*, 327 N.C. 552, 398 S.E.2d 475 (1990); *State v. Nobles*, 329 N.C. 239, 404 S.E.2d 668 (1991); *State v. Rainey*, 331 N.C. 259, 415 S.E.2d 337 (1992); *Holloway v. Wachovia Bank & Trust Co.*, 333 N.C. 94, 423 S.E.2d 752 (1992); *Wireways, Inc. v. Mitek Indus., Inc.*, 333 N.C. 253, 424 S.E.2d 384 (1993).

§ 7A-32. Power of Supreme Court and Court of Appeals to issue remedial writs.

CASE NOTES

Or When Counsel Fails to Follow Statutory Procedures. — Even though counsel employed by defendant failed to follow the statutory procedure for appealing to the Court of Appeals, because of the important issues raised by the appeal, defendant's petition for writ of certiorari, pursuant to § 7A-32(c), and pursuant to N.C.R.A.P., Rule 21, was allowed. *State v. Hamrick*, 110 N.C. App. 60, 428 S.E.2d 830, appeal dismissed, cert. denied, 334 N.C. 436, 433 S.E.2d 181 (1993).

The authority of a superior court

to grant a writ of certiorari pursuant to Gen. Rules Prac., Rule 19 in appropriate cases is analogous to the Court of Appeals' power to issue a writ of certiorari pursuant to § 7A-32(c). *State v. Hamrick*, 110 N.C. App. 60, 428 S.E.2d 830, appeal dismissed, cert. denied, 334 N.C. 436, 433 S.E.2d 181 (1993).

Cited in *Nobles v. First Carolina Communications, Inc.*, 108 N.C. App. 127, 423 S.E.2d 312 (1992); *Martin v. Piedmont Asphalt & Paving Co.*, 113 N.C. App. 121, 437 S.E.2d 696 (1993).

§ 7A-33. Supreme Court to prescribe appellate division rules of practice and procedure.

CASE NOTES

Cited in *State v. Monroe*, 330 N.C. 433, 410 S.E.2d 913 (1991).

§ 7A-34. Rules of practice and procedure in trial courts.

CASE NOTES

Cited in *State v. Coffey*, 326 N.C. 268, 389 S.E.2d 48 (1990); *State v. Hudson*, 331 N.C. 122, 415 S.E.2d 732 (1992).

§ 7A-37: Repealed by Session Laws 1993, c. 553, s. 1, effective July 24, 1993.

§ 7A-37.1. Statewide court-ordered, nonbinding arbitration in certain civil actions.

Cross References. — As to dispute settlement center reports, see § 7A-346.1.

Editor's Note. —

Session Laws 1991, c. 742, s. 10 provides: "From funds appropriated to the Judicial Department in the certified budget for the 1991-92 fiscal year, the Administrative Office of the Courts may transfer up to \$75,000 to implement nonbinding arbitration procedures in

additional counties and judicial districts pursuant to G.S. 7A-37.1 and to establish local custody and visitation mediation programs in additional counties pursuant to G.S. 7A-494."

Session Laws 1991 (Reg. Sess., 1992), c. 900, s. 114 provides: "From funds appropriated to the Judicial Department in the certified budget for the 1992-93 fiscal year, the Administrative Office of the Courts may transfer within its bud-

get up to seventy-five thousand dollars (\$75,000) to implement nonbinding arbitration procedures in additional counties and judicial districts pursuant to G.S. 7A-37.1 and to establish local custody mediation and visitation programs in additional counties pursuant to G.S. 7A-494."

Session Laws 1993, c. 253, s. 6, which became effective June 30, 1993 and ex-

pired August 1, 1993, provided that the Administrative Office of the Courts could transfer, from funds appropriated to the Judicial Department in the certified budget for the 1992-93 fiscal year, funds to continue nonbinding arbitration procedures pursuant to G.S. 7A-37.1 and local custody mediation and visitation programs pursuant to G.S. 7A-494.

§ 7A-38. Court ordered, mediated settlement conferences in superior court civil actions.

(a) Purpose. This section is enacted in order to provide for a pilot program in judicial districts selected by the Director of the Administrative Office of the Courts in which parties to superior court civil litigation may be required to attend a pretrial settlement conference conducted by a mediator. The purpose of the pilot program is to determine whether a system of mediated settlement conferences may make the operation of the superior courts more efficient, less costly, and more satisfying to the litigants.

(b) Definitions as used in this section:

- (1) "Mediated settlement conference" means a court ordered conference between or among the parties to a civil action and their representatives conducted by a mediator prior to trial.
- (2) "Mediation" means an informal process conducted by a mediator with the objective of helping parties voluntarily reach a mutually acceptable settlement of their dispute.
- (3) "Mediator" means a neutral person who acts to encourage and facilitate a resolution of a pending civil action. A mediator does not render a judgment as to the merit of the action.

(c) Selection of districts. This procedure may be implemented in a judicial district or any part of a judicial district if the Director of the Administrative Office of the Courts and the senior resident superior court judge of that district determine that use of this program may assist in achieving objectives stated in subsection (a) of this section. The Director of the Administrative Office of the Courts may terminate any pilot program after consultation with the senior resident superior court judge.

(d) Rules of mediated settlement conferences. The Supreme Court may adopt rules to implement this section.

(e) Judge to select cases for mediated settlement conferences. The senior resident superior court judge of any district participating, in whole or in part, in any pilot program may order a mediated settlement conference for all or any part of a superior court civil action pending in the pilot area, except as limited by the rules of the Supreme Court adopted under the authority of this section.

(f) Attendance of parties. The parties to a civil action in which a mediated settlement conference is ordered, their attorneys, and other persons having authority to settle the parties' claims shall attend the conference unless excused by rules of the Supreme Court or by order of the senior resident superior court judge.

(g) Selection of mediator. The parties shall have the right to stipulate to a mediator subject to the standards and rules established

by the Supreme Court. Upon failure of the parties to agree within the time established by the rules, a mediator shall be appointed by the senior resident superior court judge.

(h) Sanctions. Upon failure of a party or attorney to attend a court ordered mediated settlement conference to the extent required by this section and rules promulgated by the Supreme Court, a resident or presiding judge may impose any lawful sanction, including but not limited to the payment of attorneys' fees, mediator fees, and expenses incurred in attending the conference, contempt, or any other sanction authorized by G.S. 1A-1, Rule 37(b).

(i) Standards for mediators. The Supreme Court is authorized to establish standards for the qualification and conduct of mediators and mediator training programs. An administrative fee may be set by the Administrative Office of the Courts to be charged to applicants for approval as mediators and mediator training programs.

(j) Immunity. A mediator acting pursuant to this section shall have judicial immunity in the same manner and to the same extent as a judge of the General Court of Justice.

(k) Costs of mediated settlement conference. Costs of the mediated settlement conference shall be paid: one share by the plaintiffs, one share by the defendants, and one share by any third-party defendant, unless otherwise ordered by the court or agreed to by the parties. The rules established by the Supreme Court under subsection (d) of this section shall set out a method whereby the parties found by the court to be unable to pay the costs of the mediated settlement conference are afforded an opportunity to participate without cost.

(l) Inadmissibility of negotiations. All conduct or communications made during a mediated settlement conference are presumed to be made in compromise negotiations and shall be governed by Rule 408 of the North Carolina Rules of Evidence.

(m) Evaluation. The pilot program authorized by this section shall be evaluated for a reasonable period of time under the direction of the Administrative Office of the Courts. The Director of the Administrative Office of the Courts shall report the results of the evaluation to the General Assembly.

(n) Funding of the pilot program. The Administrative Office of the Courts may solicit funds from private sources to establish, conduct, and evaluate this pilot program. No State funds shall be used to establish, conduct, or evaluate this program.

(o) Report on pilot program. The Administrative Office of the Courts shall file a written report with the General Assembly on the evaluation of the pilot program on or before May 1, 1995. The pilot program shall terminate on June 30, 1995.

(p) Right to jury trial. Nothing in this section or the rules promulgated by the Supreme Court implementing this section shall restrict the right to jury trial. (1991, c. 207, s. 1; c. 761, s. 2; 1993, c. 553, s. 7.)

Cross References. — As to court ordered, mediated settlement conferences in superior court civil actions, see Rule 1, Med. Settle. Rules. As to dispute settlement center reports, see § 7A-346.1.

Editor's Note. — Session Laws 1991, c. 207, s. 1, made this section effective

October 1, 1991, and applicable to mediated settlement conferences established on and after the Supreme Court's rules are adopted governing this establishment.

Effect of Amendments. — Session Laws 1991, c. 761, s. 2, effective July 16,

1991, amended subsection (h) of this section as enacted by Session Laws 1991, c. 207, s. 1, by substituting "attorneys' fees" for "attorney fees." As to the applicability of this amendment, see the Editor's Note.

The 1993 amendment, effective July

24, 1993, in subsection (I) substituted "Inadmissibility" for "Inadmissability."

Legal Periodicals. — For comment, "An End to Settlement on the Courthouse Steps? Mediated Settlement Conferences in North Carolina Superior Courts," see 71 N.C.L. Rev. 1857 (1993).

CASE NOTES

Sanctions for Failure to Attend. — Trial court did not abuse its discretion by striking defendant's answer and entering default where corporate defendant had no good cause for failing to have officer mediation settlement conference and was not excused, less severe

sanctions were considered rejected as inappropriate, and the sanctions entered were specifically authorized by former Rule 37(b)(2)c (repealed by 1993 Session Laws, c. 553, s.1). *Triad Mack Sales & Service, Inc. v. Clement Bros. Co.*, 113 N.C. App. 405, 438 S.E.2d 485 (1994).

§ 7A-39: Reserved for future codification purposes.

ARTICLE 6.

Retirement of Justices and Judges of the Appellate Division; Retirement Compensation; Recall to Emergency Service; Disability Retirement.

§ 7A-39.2. Age and service requirements for retirement of justices of the Supreme Court and judges of the Court of Appeals.

Legal Periodicals. — For note entitled, "Gregory v. Ashcroft: The Plain Statement Rule and Judicial Supervi-

sion of Federal-State Relations," see 70 N.C.L. Rev. 1563 (1992).

§ 7A-39.14. (See Editor's note) Recall by Chief Justice of retired or emergency justices or judges for temporary vacancy.

Editor's Note. —

The historical citation in parentheses at the end of this section as set out in the

main volume should contain a reference to Session Laws 1989, c. 795, s. 27.1.

SUBCHAPTER III. SUPERIOR COURT DIVISION OF THE GENERAL COURT OF JUSTICE.

ARTICLE 7.

Organization.

§ 7A-41. (For effective date see note) Superior court divisions and districts; judges.

(a) The counties of the State are organized into judicial divisions and superior court districts, and each superior court district has the counties, and the number of regular resident superior court judges set forth in the following table, and for districts of less than a whole county, as set out in subsection (b) of this section:

Judicial Division	Superior Court District	Counties	No. of Resident Judges
First	1	Camden, Chowan, Currituck, Dare, Gates, Pasquotank, Perquimans	2
	2	Beaufort, Hyde, Martin, Tyrrell, Washington	1
	3A	Pitt	2
	3B	Carteret, Craven, Pamlico	2
	4A	Duplin, Jones, Sampson	1
	4B	Onslow	1
	5	New Hanover, Pender	3
	6A	Halifax	1
	6B	Bertie, Hertford, Northampton	1
	7A	Nash	1
	7B	(part of Wilson, part of Edgecombe, see subsection (b))	1
	7C	(part of Wilson, part of Edgecombe, see subsection (b))	1
	8A	Lenoir and Greene	1
	8B	Wayne	1
Second	9	Franklin, Granville, Vance, Warren	2
	9A	Person, Caswell	1
	10A	(part of Wake, see subsection (b))	2
	10B	(part of Wake,	2

Judicial Division	Superior Court District	Counties	No. of Resident Judges
Third		see subsection (b))	
	10C	(part of Wake, see subsection (b))	1
	10D	(part of Wake, see subsection (b))	1
	11	Harnett, Johnston, Lee	2
	12A	(part of Cumberland, see subsection (b))	1
	12B	(part of Cumberland, see subsection (b))	1
	12C	(part of Cumberland, see subsection (b))	2
	13	Bladen, Brunswick, Columbus	2
	14A	(part of Durham, see subsection (b))	1
	14B	(part of Durham, see subsection (b))	3
	15A	Alamance	2
	15B	Orange, Chatham	1
	16A	Scotland, Hoke	1
	16B	Robeson	2
	17A	Rockingham	2
	17B	Stokes, Surry	2
	18A	(part of Guilford, see subsection (b))	1
	18B	(part of Guilford, see subsection (b))	1
	18C	(part of Guilford, see subsection (b))	1
	18D	(part of Guilford, see subsection (b))	1
	18E	(part of Guilford, see subsection (b))	1
	19A	Cabarrus	1
	19B	Montgomery, Randolph	1
	19C	Rowan	1
	20A	Anson, Moore, Richmond	2
	20B	Stanly, Union	2
	21A	(part of Forsyth, see subsection (b))	1
	21B	(part of Forsyth, see subsection (b))	1
	21C	(part of Forsyth, see subsection (b))	1
	21D	(part of Forsyth, see subsection (b))	1
	22	Alexander, Davidson, Davie, Iredell	2
	23	Alleghany, Ashe,	1

Judicial Division	Superior Court District	Counties	No. of Resident Judges
Fourth	24	Wilkes, Yadkin	1
		Avery, Madison,	
		Mitchell,	
	25A	Watauga, Yancey	2
		Burke, Caldwell	
		Catawba	
	26A	(part of Mecklenburg,	2
		see subsection (b))	
		(part of Mecklenburg,	
	26B	see subsection (b))	2
		(part of Mecklenburg,	
		see subsection (b))	
	26C	(part of Mecklenburg,	2
		see subsection (b))	
		Gaston	
	27A	Cleveland, Lincoln	2
		Buncombe	
		Henderson,	
	28	McDowell, Polk,	2
		Rutherford,	
		Transylvania	
	30A	Cherokee, Clay,	1
		Graham, Macon,	
		Swain	
	30B	Haywood, Jackson	1

(b) For superior court districts of less than a whole county, or with part of one county with part of another, the composition of the district and the number of judges is as follows:

- (1) Superior Court District 7B consists of County Commissioner Districts 1, 2 and 3 of Wilson County, Blocks 127 and 128 of Census Tract 6 of Wilson County, and Townships 12 and 14 of Edgecombe County. It has one judge.
- (2) Superior Court District 7C consists of the remainder of Edgecombe and Wilson Counties not in Judicial District 7B. It has one judge.
- (3) Superior Court District 10A consists of Raleigh Precincts 12, 13, 14, 18, 19, 20, 22, 25, 26, 28, 34, 35, and 40, and St. Matthews #3, except that if the Wake County Board of Elections provides that the area in Raleigh Township which was incorrectly placed in a St. Mary's precinct shall be in Raleigh Precinct 40, that area shall be considered to be in Raleigh Precinct 40 for district purposes. It has one judge.
- (4) Superior Court District 10B consists of Buckhorn Precinct, Cary Precincts 1, 2, 3, 4, 5, 6, and 7, Cedar Fork Precinct, Holly Springs Precinct, House Creek Precinct #1, Meredith Precinct, Middle Creek Township, Raleigh Precincts 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 16, 21, 23, 24, 27, 29, 31, 32, 33, 36, and 41, Swift Creek Precinct #1 and #2 and White Oak Township. It has two judges.
- (5) Superior Court District 10C consists of Barton's Creek Precinct, Leesville Precinct, House Creek Precinct #2, Little River Township, Marks Creek Township, New Light Township, Panther Branch Township, St. Mary's Precincts #1,

- #2, #3, #4, #5, and #6, and Wake Forest Township. It has one judge.
- (6) Superior Court District 10D consists of the remainder of Wake County not in Superior Court Districts 10A, 10B or 10C. It has one judge.
 - (7) Superior Court District 12A consists of that part of Cross Creek Precinct #18 north of Raeford Road, Montclair Precinct, that part of Precinct 71-1 not in Judicial District 12B, Precinct 71-2, Morganton #2 Precinct, Cottonade Precinct, Cumberland Precincts 1 and 2, and Brentwood Precinct. It has one judge.
 - (8) Superior Court District 12B consists of all of State House of Representatives District 17, except for Westarea Precinct, and it also includes that part of Cross Creek Precinct #15 east of Village Drive. It has one judge.
 - (9) Superior Court District 12C consists of the remainder of Cumberland County not in Superior Court Districts 12A or 12B. It has two judges.
 - (10) Superior Court District 14A consists of Durham Precincts 9, 11, 12, 13, 14, 15, 18, 34, 40, 41, and 42, and that part of Durham Precinct 39 east of North Carolina Highway #751. It has one judge.
 - (11) Superior Court District 14B consists of the remainder of Durham County not in Superior Court District 14A. It has three judges.
 - (12) Superior Court District 18A consists of Greensboro Precincts 5, 6, 7, 8, 9, 19, 25, 29, 30, 44, and 45 and Clay and Fentress Precincts. It has one judge.
 - (13) Superior Court District 18B consists of High Point Precincts 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 20, and 21, Deep River Precinct, and Jamestown Precincts 1 and 3. It has one judge.
 - (14) Superior Court District 18C consists of Greensboro Precincts 20, 27, 31, 32, 34, 37, 38, 39, and 43, High Point Precinct 19, Stokesdale, Oak Ridge, Bruce, Friendship I, Friendship II, Jamestown II, South Center Grove, North Center Grove, and North Monroe Precincts. It has one judge.
 - (15) Superior Court District 18D consists of Greensboro Precincts 4, 11, 13, 14, 15, 16, 17, 18, 21, 22, 23, 24, 26, 36, and 42, and North and South Sumner Precincts. It has one judge.
 - (16) Superior Court District 18E consists of the remainder of Guilford County not in Superior Court Districts 18A, 18B, 18C, or 18D. It has one judge.
 - (17) Superior Court District 21A consists of the Southwest Ward of Winston-Salem, and Precincts 80-6, 80-7, 80-8, 3-1, 9-1, 13-1, 13-2, 13-3, 7-1, 7-2, 7-3, 5-1, 5-2, 5-3, 12-2, and 12-3. It has one judge.
 - (18) Superior Court District 21B consists of the Northwest Ward, the South Ward, and the Southeast Ward of Winston-Salem, and Precincts 4-1 and 4-2. It has one judge.
 - (19) Superior Court District 21C consists of Precincts 80-1, 80-2, 80-3, 80-4, 80-5, 80-9, 10-2, 10-3, 3-2, 3-3, 11-1, 11-2, 2-1, 6-1, 6-2, 6-3, 6-4, 1-1, 1-2, and 1-3. It has one judge.

- (20) Superior Court District 21D consists of the North Ward, the Northeast Ward, and the East Ward of Winston-Salem, and Precincts 8-2 and 8-3. It has one judge.
 - (21) Superior Court District 26A consists of Charlotte Precincts 11, 12, 13, 14, 15, 16, 22, 23, 24, 25, 26, 27, 31, 33, 39, 41, 42, 46, 52, 54, 55, 56, 58, 60, 77, 78, and 82, and Long Creek Precinct #2 of Mecklenburg County. It has two judges.
 - (22) Superior Court District 26B consists of Charlotte Precincts 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 17, 18, 20, 21, 28, 29, 30, 32, 34, 35, 36, 37, 38, 43, 44, 45, 47, 51, 61, 62, 63, 65, 66, 67, 68, 69, 71, 74, 83, 84, and 86, Crab Orchard Precincts 1 and 2, and Mallard Creek Precinct 1. It has two judges.
 - (23) Superior Court District 26C consists of the remainder of Mecklenburg County not in Superior Court Districts 26A or 26B. It has two judges.
- (c) In subsection (b) above:
- (1) the names and boundaries of townships are as they were legally defined and in effect as of January 1, 1980, and recognized in the 1980 U.S. Census;
 - (2) for Guilford County, precinct boundaries are as shown on maps in use by the Guilford County Board of Elections on April 15, 1987;
 - (3) for Mecklenburg, Wake, and Durham Counties, precinct boundaries are as shown on the current maps in use by the appropriate county board of elections as of January 31, 1984, in accordance with G.S. 163-128(b);
 - (4) for Wilson County, commissioner districts are those in use for election of members of the county board of commissioners as of January 1, 1987;
 - (5) for Cumberland County, House District 17 is in accordance with the boundaries in effect on January 1, 1987. Precincts are in accordance with those as approved by the United States Department of Justice on February 28, 1986; and
 - (6) for Forsyth County, the boundaries of wards and precincts are those in effect on "WARD MAP 1985", published November 1985 by the City of Winston-Salem and Forsyth County.

If any changes in precinct boundaries, wards, commissioner districts, or House of Representative districts have been made since the dates specified, or are made, those changes shall not change the boundaries of the superior court districts; provided that if any of those boundaries have changed, a precinct is divided by a superior court judicial district boundary, and the precinct was not so divided at the time of enactment of this section in 1987, the boundaries of the superior court judicial district are changed to place the entirety of the precinct in the superior court judicial district where the majority of the residents of the precinct reside, according to the 1990 Federal Census if:

- (1) Such change does not result in placing a superior court judge in another superior court district;
- (2) Such change does not make a district that has an effective racial minority electorate not have an effective racial minority electorate; and

- (3) The change is approved by the the county board of elections where the precinct is located, State Board of Elections and by the Secretary of State upon finding that the change:
 - a. Will improve election administration; and
 - b. Complies with subdivisions (1) and (2) of this subsection.
- (d) The several judges, their terms of office, and their assignments to districts are as follows:
 - (1) In the first superior court district, J. Herbert Small and Thomas S. Watts serve terms expiring December 31, 1994.
 - (2) In the second superior court district, William C. Griffin serves a term expiring December 31, 1994.
 - (3) In the third-A superior court district, David E. Reid serves a term expiring on December 31, 1992.
 - (4) In the third-B superior court district, Herbert O. Phillips, III, serves a term expiring on December 31, 1994.
 - (5) In the fourth-A superior court district, Henry L. Stevens, III, serves a term expiring December 31, 1994.
 - (6) In the fourth-B superior court district, James R. Strickland serves a term expiring December 31, 1992.
 - (7) In the fifth superior court district, no election shall be held in 1992 for the full term of the seat now occupied by Bradford Tillery, and the holder of that seat shall serve until a successor is elected in 1994 and qualifies. The succeeding term begins January 1, 1995. In the fifth superior court district, Napoleon B. Barefoot serves a term expiring December 31, 1994.
 - (8) In the sixth-A superior court district, Richard B. Allsbrook serves a term expiring December 31, 1990.
 - (9) In the sixth-B superior court district, a judge shall be elected in 1988 to serve an eight-year term beginning January 1, 1989.
 - (10) In the seventh-A superior court district, Charles B. Winberry, serves a term expiring December 31, 1994.
 - (11) In the seventh-B superior court district, a judge shall be elected in 1988 to serve an eight-year term beginning January 1, 1989.
 - (12) In the seventh-C superior court district, Franklin R. Brown serves a term expiring December 31, 1990.
 - (13) In the eighth-A superior court district, James D. Llewellyn serves a term expiring December 31, 1994.
 - (14) In the eighth-B superior court district, Paul M. Wright serves a term expiring December 31, 1992.
 - (15) In the ninth superior court district, Robert H. Hobgood and Henry W. Hight, Jr., serve terms expiring December 31, 1994.
 - (16) In the tenth-A superior court district, a judge shall be elected in 1988 to serve an eight-year term beginning January 1, 1989.
 - (17) In the tenth-B superior court district, Robert L. Farmer serves a term expiring December 31, 1992. In the tenth-B superior court district, no election shall be held in 1990 for the full term of the seat now occupied by Henry V. Barnette, Jr., and the holder of that seat shall serve until a successor is elected in 1992 and qualifies. The succeeding term begins January 1, 1993.

- (18) In the tenth-C superior court district, Edwin S. Preston, serves a term expiring December 31, 1990. In the tenth-D superior court district, Donald Stephens serves a term expiring December 31, 1988.
- (19) In the eleventh superior court district, Wiley F. Bowen serves a term expiring December 31, 1990.
- (20) In the twelfth-A superior court district, D.B. Herring, Jr., serves a term expiring December 31, 1990.
- (21) In the twelfth-B superior court district, a judge shall be elected in 1988 to serve an eight-year term beginning January 1, 1989.
- (22) In the twelfth-C superior court district, no election shall be held in 1992 for the full term of the seat now occupied by Coy E. Brewer, Jr., and the holder of that seat shall serve until a successor is elected in 1994 and qualifies. The succeeding term begins January 1, 1995. In the twelfth-C superior court district, E. Lynn Johnson serves a term expiring December 31, 1994.
- (23) In the thirteenth superior court district, Giles R. Clark serves a term expiring December 31, 1994.
- (24) In the fourteenth-A superior court district, a judge shall be elected in 1988 to serve an eight-year term beginning January 1, 1989.
- (25) In the fourteenth-B superior court district, no election shall be held in 1992 for the full term of the seat now occupied by Anthony M. Brannon, and the holder of that seat shall serve until a successor is elected in 1994 and qualifies. The succeeding term begins July 1, 1995.
- (26) In the fourteenth-B superior court district, no election shall be held in 1990 for the full term of the seat now occupied by Thomas H. Lee, and the holder of that seat shall serve until a successor is elected in 1994 and qualifies. The succeeding term begins January 1, 1995. In the fourteenth-B superior court district, J. Milton Read, Jr., serves a term expiring December 31, 1994.
- (27) In the fifteenth-A superior court district, J.B. Allen, Jr., serves a term expiring December 31, 1994.
- (28) In the fifteenth-B superior court district, F. Gordon Battle serves a term expiring December 31, 1994.
- (29) In the sixteenth-A superior court district, B. Craig Ellis serves a term expiring December 31, 1994.
- (30) In the sixteenth-B superior court district, a judge shall be elected in 1988 to serve an eight-year term beginning January 1, 1989. In the sixteenth-B judicial [superior court] district, a judge shall be appointed by the Governor to serve until the results of the 1990 general election are certified. A person shall be elected in the 1990 general election to serve the remainder of the term expiring December 31, 1996.
- (31) In the seventeenth-A superior court district, Melzer A. Morgan, Jr., serves a term expiring December 31, 1990.
- (32) In the seventeenth-B superior court district, James M. Long serves a term expiring December 31, 1994.
- (33) In the eighteenth-A superior court district, a judge shall be elected in 1988 to serve an eight-year term beginning January 1, 1989.

- (34) In the eighteenth-B superior court district, Edward K. Washington's term expired December 31, 1986, but he is holding over because of a court order enjoining an election from being held in 1986. A successor shall be elected in 1988 to serve an eight-year term beginning January 1, 1989.
- (35) In the eighteenth-C superior court district, W. Douglas Albright serves a term expiring December 31, 1990.
- (36) In the eighteenth-D superior court district, Thomas W. Ross's term expired December 31, 1986, but he is holding over because of a court order enjoining an election from being held in 1986. A successor shall be elected in 1988 to serve an eight-year term beginning January 1, 1989.
- (37) In the eighteenth-E superior court district, Joseph John's term expired December 31, 1986, but he is holding over because of a court order enjoining an election from being held in 1986. A successor shall be elected in 1988 to serve an eight-year term beginning January 1, 1989.
- (38) In the nineteenth-A superior court district, James C. Davis serves a term expiring December 31, 1992.
- (39) In the nineteenth-B superior court district, Russell G. Walker, Jr., serves a term expiring December 31, 1990.
- (40) In the nineteenth-C superior court district, Thomas W. Seay, Jr., serves a term expiring December 31, 1990.
- (41) In the twentieth-A superior court district, F. Fetzer Mills serves a term expiring December 31, 1992.
- (42) In the twentieth-B superior court district, William H. Helms serves a term expiring December 31, 1990.
- (43) In the twenty-first-A superior court district, William Z. Wood serves a term expiring December 31, 1990.
- (44) In the twenty-first-B superior court district, Judson D. DeRamus, Jr., serves a term expiring December 31, 1988.
- (45) In the twenty-first-C superior court district, William H. Freeman serves a term expiring December 31, 1990.
- (46) In the twenty-first-D superior court district, a judge shall be elected in 1988 to serve an eight-year term beginning January 1, 1989.
- (47) In the twenty-second superior court district, no election shall be held in 1992 for the full term of the seat now occupied by Preston Cornelius, and the holder of that seat shall serve until a successor is elected in 1994 and qualifies. The succeeding term shall begin January 1, 1995. In the twenty-second superior court district, Robert A. Collier serves a term expiring December 31, 1994.
- (48) In the twenty-third superior court district, Julius A. Rousseau, Jr., serves a term expiring December 31, 1990.
- (49) In the twenty-fourth superior court district, Charles C. Lamm, Jr., serves a term expiring December 31, 1994.
- (50) In the twenty-fifth-A superior court district, Claude S. Sitton serves a term expiring December 31, 1994.
- (51) In the twenty-fifth-B superior court district, Forrest A. Ferrell serves a term expiring December 31, 1990.
- (52) In the twenty-sixth-A superior court district, no election shall be held in 1994 for the full term of the seat now occupied by W. Terry Sherrill, and the holder of that seat shall serve until a successor is elected in 1996 and quali-

- fies. The succeeding term shall begin January 1, 1997. In the twenty-sixth-A superior court district, a judge shall be elected in 1988 to serve an eight-year term beginning January 1, 1989.
- (53) In the twenty-sixth-B superior court district, Frank W. Snapp, Jr., and Kenneth A. Griffin serve terms expiring December 31, 1990.
 - (54) In the twenty-sixth-C superior court district, no election shall be held in 1992 for the full term of the seat now occupied by Chase Boone Saunders, and the holder of that seat shall serve until a successor is elected in 1994 and qualifies. The succeeding term shall begin January 1, 1995. In the twenty-sixth-C superior court district, Robert M. Burroughs serves a term expiring December 31, 1994.
 - (55) In the twenty-seventh-A superior court district, no election shall be held in 1988 for the full term of the seat now occupied by Robert E. Gaines, and the holder of that seat shall serve until a successor is elected in 1990 and qualifies. The succeeding term begins January 1, 1991. In the twenty-seventh-A superior court district, Robert W. Kirby serves a term expiring December 31, 1990.
 - (56) In the twenty-seventh-B superior court district, John M. Gardner serves a term expiring December 31, 1994.
 - (57) In the twenty-eighth superior court district, Robert D. Lewis and C. Walter Allen serve terms expiring December 31, 1990.
 - (58) In the twenty-ninth superior court district, Hollis M. Owens, Jr., serves a term expiring December 31, 1990.
 - (59) In the thirtieth-A superior court district, James U. Downs serves a term expiring December 31, 1990.
 - (60) In the thirtieth-B superior court district, Janet M. Hyatt serves a term expiring December 31, 1994. (1969, c. 1171, ss. 1-3; c. 1190, s. 4; 1971, c. 377, s. 5; c. 997; 1973, c. 47, s. 2; c. 646; c. 855, s. 1; 1975, c. 529; c. 956, ss. 1, 2; 1975, 2nd Sess., c. 983, s. 114; 1977, c. 1119, ss. 1, 3, 4; c. 1130, ss. 1, 2; 1977, 2nd Sess., c. 1238, s. 1; c. 1243, s. 4; 1979, c. 838, s. 119; c. 1072, s. 1; 1979, 2nd Sess., c. 1221, s. 1; 1981, c. 964, ss. 1, 2; 1981 (Reg. Sess., 1982), c. 1282, s. 71.2; 1983 (Reg. Sess., 1984), c. 1109, ss. 4, 4.1; 1985, c. 698, s. 11(a); 1987, c. 509, s. 1; c. 549, s. 6.6; 1987 (Reg. Sess., 1988), c. 1037, s. 1; c. 1056, ss. 14, 15; 1989, c. 795, s. 22(a); 1991, c. 746, s. 1; 1993, c. 321, ss. 200.4(a), 200.5(a), (d).)

Editor's Note. —

The word "the" appears twice in the second subdivision (c)(3), as the word appeared twice in the amending act, Session Laws 1991, c. 746, s. 1.

Session Laws 1993, c. 321, s. 200.4(b), (c), (g), (i) and (p) provide:

"(b) The Governor shall appoint the superior court judge for the position created by subsection (a) of this section, whose term shall expire December 31, 1994. This appointed judge's successor shall be chosen in the 1994 general election.

"(c) One superior court reporter posi-

tion shall be transferred from current District 17A to newly created District 9A.

"(g) Secretarial services for the chief district court judge in newly created District 9A shall be provided by the secretary of the superior court judge in newly created Superior Court District 9A, created by subsection (a) of this section.

"(i) Juvenile intake, probation, and aftercare services for newly created District 9A shall be provided by the chief court counselor's office in District 17A. One such position serving the chief court counselor's in current District 9 shall be

transferred to District 17A to facilitate the provision of juvenile intake, probation, and aftercare services to newly created District 9A.

"(p) It is the intent of the General Assembly that Superior Court District 17A, District Court District 17A, and Prosecutorial District 17A, as altered by this section, shall remain single-county districts, pursuant to the authority of the General Assembly under Article IV of the North Carolina Constitution to divide the State into a convenient number of districts."

Session Laws 1993, c. 321, s. 200.5(b) and (e) provide:

"(b) The Governor shall appoint superior court judges for the additional judgeships in superior court districts 3B, 10A, 15A, 17B, and 25B. For superior court districts 3B, 15A, and 17B, successors shall be elected in the 1994 general election for eight-year terms. For superior court district 10A, the successor shall be elected in the 1994 general election to serve the remainder of the unexpired term expiring December 31, 1996. For superior court districts 20B and 25B, successors shall be elected in the 1994 general election to serve the remainder of the unexpired terms expiring December 31, 1998. This is to provide unstaggered terms for multiple judgeships in the same district.

"(e) The additional superior court judge for superior court district 27B shall be elected in the 1994 general election for an eight-year term."

Session Laws 1993, c. 321, s. 321 provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 1993-95 biennium, the textual provisions of this act shall apply only to funds appropriated for and activities occurring during the 1993-95 biennium."

Session Laws 1993, c. 321, s. 322 is a severability clause.

Session Laws 1994, Extra Session, c. 1, s. 2.1 provides: "Notices of candidacy for superior court judges in Superior Court District 9A must be filed with the State Board of Elections no earlier than 12:00 noon on the business day after this act is effective under section 5 of the Voting Rights Act of 1965, and not later than 12:00 noon on Friday, March 11, 1994."

Session Laws 1994, Extra Session, c. 1, s. 3 provides: "In addition to any notices of candidacy for superior court which were validly filed during the pe-

riod previously provided for, notices of candidacy for Superior Court Districts 3B, 9A, 10A, 15A, 17B, 20B, 25B, and 27B must be filed with the State Board of Elections no earlier than 12:00 noon on the business day after this act is effective under section 5 of the Voting Rights Act of 1965, and not later than 12:00 noon on Friday, March 11, 1994."

Session Laws 1994, Extra Session, c. 1, s. 4(a) provides that the provisions of G.S. 163-107.1 do not apply to any offices covered by c. 1 in the 1994 primary.

Session Laws 1994, Extra Session, c. 1, s. 4(b) provides: "Notwithstanding the provisions of Article 20 or Article 21 of Chapter 163 of the General Statutes, the time by which absentee ballots are required to be printed and distributed for the 1994 primary only is reduced from 50 days to 40 days before the primary election. This subsection applies on a statewide basis and to all offices and to all elections held on that date."

Session Laws 1994, Extra Session, c. 1, s. 5 provides: "Notices of candidacy for 1994 validly filed in:

- "(1) Superior Court Districts 3B, 9, 9A, 10A, 15A, 17B, 20B, 25B, and 27B prior to the filing deadline of February 18, 1994;
- "(2) Prosecutorial Districts 9 and 17A prior to the filing deadline of February 7, 1994; and
- "(3) District Court District 17A prior to the filing deadline of February 7, 1994

are not voided, but shall continue to apply. Except as to Superior Court District 9, Prosecutorial Districts 9 and 17A, and District Court District 17A, they may, however, be withdrawn as provided in G.S. 163-106(e) if such withdrawal is made before the filing deadline established by this act, and in such case the filing fee shall be refunded as provided by G.S. 163-107(b). Provided, that notices of candidacy in District Court District 17A for the seat which is reallocated from District 17A to District 9A by Section 200.4(f) of Chapter 321 of the 1993 Session Laws are voided, and that person's filing fee shall be credited to any new filing under this act or refunded if the candidate does not file or is not eligible to file."

Session Laws 1994, Extra Session, c. 1, s. 6 provides: "This act is effective upon ratification [February 17, 1994], but may not be enforced except as provided by section 5 of the Voting Rights Act of 1965."

Session Laws 1993 (Reg. Sess., 1994), c. 769, s. 24.12 provides: "(a) If the superior court judge holding office on June 1, 1994 whose successor's term is to begin July 1, 1995 under G.S. 7A-41(d)(25) is not a regular superior court judge on January 1, 1995, then the succeeding term begins January 1, 1995, and the remainder of this section does not apply.

"(b) If the superior court judge holding office on June 1, 1994 whose successor's term is to begin July 1, 1995 under G.S. 7A-41(d)(25) ceases to be a regular superior court judge between January 1, 1995 and July 1, 1995, the term of that judge's successor begins on the date that judge ceases to be a regular superior court judge.

"(c) If in superior court district 14B only one of the three persons elected for that district in the 1994 general election is a special superior court judge on January 1, 1995, then that person is the successor to the judge whose term was determined by G.S. 7A-41(d)(25), but in such case the successor's service as a special superior court judge shall be considered service as a regular resident superior court judge under G.S. 7A-4.1(b)(2).

"(d) If subsection (c) of this section does not apply, in superior court district 14B the State Board of Elections shall choose by lot among those persons elected in 1994 who were not regular superior court judges, and the person chosen by lot is the successor to the judge whose term was determined by G.S. 7A-41(d)(25)."

Session Laws 1993 (Reg. Sess., 1994), c. 769, s. 43.2 provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 1994-95 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 1994-95 fiscal year."

Session Laws 1993 (Reg. Sess., 1994), c. 769, s. 2 provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 1994.'"

Effect of Amendments. —

The 1991 amendment, effective July 16, 1991, in the paragraph following subdivision (c)(6), added the language beginning "; provided that if any of those

boundaries have changed," and at the end of subsection (c) added the subdivisions (1), (2) and (3) preceding subsection (d).

Session Laws 1993 c. 321, s. 200.4, effective November 1, 1993, or 15 days after the date upon which s. 200.4(a) and (b) are approved under Section 5 of the Voting Rights Act of 1965, whichever is later, in the list in subsection (a), deleted "Person" from the Ninth Superior Court District of the Second Judicial Division and added "Person" to Superior Court District 9A of the Second Judicial Division and added "Caswell" to Superior Court District 9A of the Second Judicial Division, and deleted "Caswell" from Superior Court District 17A of the Third Judicial Division. Preclearance was received from the U.S. Department of Justice by letter dated February 14, 1994.

Session Laws 1993 c. 321, s. 200.5(a), effective November 1, 1993, or the date upon which s. 200.5(a) and (b) are approved under Section 5 of the Voting Rights Act of 1965, whichever is later, changed the number of resident judges to "1" from "2" in the following: First Judicial Division, Superior Court District 3B, Counties of Carteret and Craven; Second Judicial Division, Superior Court District 10A, part of county of Wake (see subsection (b)); Second Judicial Division, Superior Court District 15A, County of Alamance; Third Judicial Division, Superior Court District 17B, Counties of Stokes and Surry; Third Judicial Division, Superior Court District 20B, Counties of Stanly and Union; and Fourth Judicial Division, Superior Court District 25B, County of Catawba. Preclearance was received from the U.S. Department of Justice by letter dated February 14, 1994.

Session Laws 1993, c. 321, s. 200.5(d), effective January 1, 1995, in this section as rewritten by ss. 200.4(a) and 200.5(a), changed the number of resident judges from "1" to "2" in the Fourth Judicial Division, Superior Court District 27B, Counties of Cleveland and Lincoln. Section 200.4(d) provides that the election shall be held in 1994 as provided by law. Preclearance was received from the U.S. Department of Justice by letter dated February 14, 1994.

CASE NOTES

1987 Amendment Held Constitutional. — The provisions of Session Laws 1987, c. 509, which amended subsection (d) of this section, did not violate the North Carolina Constitution. *State ex rel. Martin v. Preston*, 325 N.C. 438, 385 S.E.2d 473 (1989).

The provisions of Session Laws 1987, c. 509, which amended subsection (d) of this section, creating a one-time delay of elections and a one-time interim or hiatus between terms of office for certain superior court judgeships (causing the incumbents to hold over until the next elections were held and the succeeding terms of office began) served a public purpose and did not violate the Consti-

tution of North Carolina. *State ex rel. Martin v. Preston*, 325 N.C. 438, 385 S.E.2d 473 (1989).

By enacting Session Laws 1987, c. 509, the legislature eliminated staggered terms within multi-seat judicial districts by creating a one-time interim or hiatus between certain terms of office; as the Constitution anticipates such "hold over" situations by providing that elected judges remain in office "until their successors are elected and qualified," the act was not unconstitutional. *State ex rel. Martin v. Preston*, 325 N.C. 438, 385 S.E.2d 473 (1989).

Cited in Republican Party v. Martin, 980 F.2d 943 (4th Cir. 1992).

§ 7A-41.1. District and set of districts defined; senior resident superior court judges and their authority.

Editor's Note. —

Session Laws 1993 (Reg. Sess., 1994), c. 769, s. 24.12 provides: "(a) If the superior court judge holding office on June 1, 1994 whose successor's term is to begin July 1, 1995 under G.S. 7A-41(d)(25) is not a regular superior court judge on January 1, 1995, then the succeeding term begins January 1, 1995, and the remainder of this section does not apply.

"(b) If the superior court judge holding office on June 1, 1994 whose successor's term is to begin July 1, 1995 under G.S. 7A-41(d)(25) ceases to be a regular superior court judge between January 1, 1995 and July 1, 1995, the term of that judge's successor begins on the date that judge ceases to be a regular superior court judge.

"(c) If in superior court district 14B only one of the three persons elected for that district in the 1994 general election is a special superior court judge on January 1, 1995, then that person is the successor to the judge whose term was determined by G.S. 7A-41(d)(25), but in such case the successor's service as a

special superior court judge shall be considered service as a regular resident superior court judge under G.S. 7A-41(b)(2).

"(d) If subsection (c) of this section does not apply, in superior court district 14B the State Board of Elections shall choose by lot among those persons elected in 1994 who were not regular superior court judges, and the person chosen by lot is the successor to the judge whose term was determined by G.S. 7A-41(d)(25)."

Session Laws 1993 (Reg. Sess., 1994), c. 769, s. 43.2 provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 1994-95 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 1994-95 fiscal year."

Session Laws 1993 (Reg. Sess., 1994), c. 769, s. 2 provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 1994.'"

§ 7A-42. Sessions of superior court in cities other than county seats.

CASE NOTES

Obligation to Provide "Suitable" Facilities. — In cities other than county seats where sessions of superior court are held, boards of commissioners are obligated by statute to provide "suitable" places for holding such sessions of court. In re Alamance County Ct. Facilities, 329 N.C. 84, 405 S.E.2d 125 (1991).

Hearing Ordered to Probe Adequacy of Court Facilities. — A hearing ordered by a superior court judge to inquire into the adequacy of the Alamance County court facilities probes

the scope of the court's inherent power to direct county commissioners to ameliorate such facilities and the proper means of effecting that end. Such power exists, but the order invoking it was procedurally and substantively flawed where the commissioners against whom the order was directed were not made parties to the action, the order was ex parte, and the order intruded on discretion that properly belonged to the commissioners. In re Alamance County Ct. Facilities, 329 N.C. 84, 405 S.E.2d 125 (1991).

§ 7A-45. (Repealed effective January 1, 1989 — See note) Special judges; appointment; removal; vacancies; authority.

Editor's Note. —

Session Laws 1989 (Reg. Sess., 1990), c. 1066, s. 124 provides: "(a) Notwithstanding G.S. 7A-45, G.S. 7A-45.1, Section 7 of Chapter 509 of the 1987 Session Laws, or any other provision of law, if any special superior court judge who was holding office on the effective date of this act first took office as an appointed or elected regular or special superior court judge in the calendar year 1986, the term of office of that judge is extended through December 31, 1994.

"(b) Notwithstanding G.S. 143-23, the Judicial Department may use lapsed salary funds for fiscal year 1990-91, not to exceed the sum of \$61,260, to cover the costs of the extended term for the period of January 1, 1991, through June 30, 1991, as provided in subsection (a)."

Session Laws 1993 (Reg. Sess., 1994), c. 769, s. 24.7 provides: "Notwithstanding G.S. 7A-45, G.S. 7A-45.1, Section 7

of Chapter 509 of the 1987 Session Laws, or any other provision of law, if any special superior court judge who is holding office on the effective date of this act first took office as an appointed or elected regular or special superior court judge in the calendar year 1986, the term of that judge is extended through December 31, 1998."

Session Laws 1993 (Reg. Sess., 1994), c. 769, s. 43.2 provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 1994-95 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 1994-95 fiscal year."

Session Laws 1993 (Reg. Sess., 1994), c. 769, s. 2 provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 1994.'"

§ 7A-45.1. Special judges.

(a) Effective November 1, 1993, the Governor may appoint two special superior court judges to serve terms expiring December 31, 1998. Successors to the special superior court judges appointed pursuant to this subsection shall be appointed to four-year terms. A special judge takes the same oath of office and is subject to the same requirements and disabilities as are or may be prescribed by law for

regular judges of the superior court, save the requirement of residence in a particular district.

(b) A special judge is subject to removal from office for the same causes and in the same manner as a regular judge of the superior court, and a vacancy occurring in the office of special judge is filled by the Governor by appointment for the unexpired term.

(c) A special judge, in any court in which he is duly appointed to hold, has the same power and authority in all matters that a regular judge holding the same court would have. A special judge, duly assigned to hold the court of a particular county, has during the session of court in that county, in open court and in chambers, the same power and authority of a regular judge in all matters arising in the district or set of districts as defined in G.S. 7A-41.1(a) in which that county is located, that could properly be heard or determined by a regular judge holding the same session of court.

(d) A special judge is authorized to settle cases on appeal and to make all proper orders in regard thereto after the time for which he was commissioned has expired. (1987, c. 738, s. 123(a); 1987 (Reg. Sess., 1988), c. 1037, s. 5; 1993, c. 321, s. 200.5(g).)

Editor's Note. —

Session Laws 1989 (Reg. Sess., 1990), c. 1066, s. 124 provides: "(a) Notwithstanding G.S. 7A-45, G.S. 7A-45.1, Section 7 of Chapter 509 of the 1987 Session Laws, or any other provision of law, if any special superior court judge who was holding office on the effective date of this act first took office as an appointed or elected regular or special superior court judge in the calendar year 1986, the term of office of that judge is extended through December 31, 1994.

"(b) Notwithstanding G.S. 143-23, the Judicial Department may use lapsed salary funds for fiscal year 1990-91, not to exceed the sum of \$61,260, to cover the cost of the extended term for the period of January 1, 1991, through June 30, 1991, as provided in subsection (a)."

Session Laws 1993 c. 321, which amended this section, in s. 200.5(h) provides: "Nothing in subsection (g) of this section shall affect the term of office of the special superior court judge whose term was extended by Section 124 of Chapter 1066 of the 1989 Session Laws."

Session Laws 1993, c. 321, s. 321 provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 1993-95 biennium, the textual provisions of this act shall apply only to funds appropriated for and activities occurring during the 1993-95 biennium."

Session Laws 1993, c. 321, s. 322 is a severability clause.

Session Laws 1993 (Reg. Sess., 1994), c. 769, s. 24.7 provides: "Notwithstanding G.S. 7A-45, G.S. 7A-45.1, Section 7 of Chapter 509 of the 1987 Session Laws, or any other provision of law, if any special superior court judge who is holding office on the effective date of this act first took office as an appointed or elected regular or special superior court judge in the calendar year 1986, the term of that judge is extended through December 31, 1998."

Session Laws 1993 (Reg. Sess., 1994), c. 769, s. 43.2 provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 1994-95 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 1994-95 fiscal year."

Session Laws 1993 (Reg. Sess., 1994), c. 769, s. 2 provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 1994.'"

Effect of Amendments. —

The 1993 amendment, effective July 1, 1993, in subsection (a), added the first two sentences, deleted the former first sentence which read "The Governor may appoint two special superior court judges," and deleted the last sentence, which read "Appointments made under this section shall be to terms of office beginning August 1, 1987, and expiring December 31, 1990."

§ 7A-45.2. Emergency special judges of the superior court; qualifications, appointment, removal, and authority.

(a) Any justice or judge of the appellate division of the General Court of Justice who:

- (1) Retires under the provisions of the Consolidated Judicial Retirement Act, Article 4 of Chapter 135 of the General Statutes, or who is eligible to receive a retirement allowance under that act;
- (2) Has not reached the mandatory retirement age specified in G.S. 7A-4.20;
- (3) Has served at least five years as a superior court judge or five years as a justice or judge of the appellate division of the General Court of Justice, or any combination thereof, whether or not eligible to serve as an emergency justice or judge of the appellate division of the General Court of Justice; and
- (4) Whose judicial service ended within the preceding 10 years; may apply to the Governor for appointment as an emergency special superior court judge in the same manner as is provided for application as an emergency superior court judge in G.S. 7A-53. If the Governor is satisfied that the applicant meets the requirements of this section and is physically and mentally able to perform the duties of a superior court judge, the Governor shall issue a commission appointing the applicant as an emergency special superior court judge until the applicant reaches the mandatory retirement age for superior court judges specified in G.S. 7A-4.20.

(b) Any emergency special superior court judge appointed as provided in this section shall:

- (1) Have the same powers and duties, when duly assigned to hold court, as provided for an emergency superior court judge by G.S. 7A-48;
- (2) Be subject to assignment in the same manner as provided for an emergency superior court judge by G.S. 7A-46;
- (3) Receive the same compensation, expenses, and allowances, when assigned to hold court, as an emergency superior court judge as provided by G.S. 7A-52(b);
- (4) Be subject to the provisions and requirements of the Canons of Judicial Conduct; and
- (5) Not engage in the practice of law during any period for which the emergency special superior court judgeship is commissioned. However, this subdivision shall not be construed to prohibit an emergency special superior court judge appointed pursuant to this section from serving as a referee, arbitrator, or mediator, during service as an emergency special superior court judge when the service does not conflict with or interfere with the emergency special superior court judge's judicial service in emergency status.

(c) Upon reaching mandatory retirement age for superior court judges as set forth in G.S. 7A-4.20, any emergency special superior court judge appointed pursuant to this section, whose commission has expired, may be recalled as a recalled emergency special superior court judge to preside over any regular or special session of the superior court under the following circumstances:

- (1) The judge shall consent to the recall;
- (2) The Chief Justice may order the recall;
- (3) Prior to ordering recall, the Chief Justice shall be satisfied that the recalled judge is capable of efficiently and promptly discharging the duties of the office to which recalled;
- (4) Jurisdiction of a recalled emergency special superior court judge is as set forth in G.S. 7A-48;
- (5) Orders of recall and assignment shall be in writing and entered upon the minutes of the court to which assigned; and
- (6) Compensation, expenses, and allowances of recalled emergency special superior court judges are the same as for recalled emergency superior court judges under G.S. 7A-52(b).

(d) Any former justice or judge of the appellate division of the General Court of Justice who otherwise meets the requirements of subsection (a) of this section to be appointed an emergency special superior court judge but has already reached the mandatory retirement age for superior court judges set forth in G.S. 7A-4.20 on retirement may, in lieu of serving as an emergency judge of the court from which he retired, apply to the Governor to be appointed as an emergency special superior court judge as provided in this section. If the Governor issues a commission to the applicant, the retired justice or judge is subject to recall as an emergency special superior court judge as provided in subsection (c) of this section.

(e) No justice or judge appointed as an emergency special superior court judge or subject to recall as provided in this section shall, during the period so appointed or subject to recall, contemporaneously serve as an emergency justice or judge of the appellate division of the General Court of Justice. (1993, c. 321, s. 199.)

Editor's Note. — Session Laws 1993 c. 321, s. 323 made this section effective July 1, 1993.

Session Laws 1993, c. 321, s. 322 is a severability clause.

§ 7A-46. Special sessions.

CASE NOTES

Show Cause Order Entered Out of Term. — Where the Chief Justice on May 1, 1990, issued a commission for a judge to hold a special session of superior court for Graham County "to begin May 25, 1990, and continue one day, or until the business is disposed of," and on May 3, 1990, the judge issued an order to show cause directing respondent to appear in court on May 25, 1990, at

which time the judge was not assigned to Graham County, the show cause order was entered out of term and the court was without jurisdiction to enter the order. *In re Delk*, 103 N.C. App. 659, 406 S.E.2d 601 (1991).

Cited in *Crowell Constructors, Inc. v. State ex rel. Cobey*, 99 N.C. App. 431, 393 S.E.2d 312 (1990).

ARTICLE 8.

*Retirement of Judges of the Superior Court;
Retirement Compensation for Superior
Court Judges; Recall to Emergency
Service of Judges of the District
and Superior Court; Disability
Retirement for Judges of the
Superior Court.*

§ 7A-51. Age and service requirements for retirement of judges of the superior court and of the Administrative Officer of the Courts.

Legal Periodicals. — For note, "Gregory v. Ashcroft: The Plain Statement Rule and Judicial Supervision of Federal-State Relations," see 70 N.C.L. Rev. 1563 (1992).

§ 7A-52. Retired district and superior court judges may become emergency judges subject to recall to active service; compensation for emergency judges on recall.

(a) Judges of the district court and judges of the superior court who have not reached the mandatory retirement age specified in G.S. 7A-4.20, but who have retired under the provisions of G.S. 7A-51, or under the Uniform Judicial Retirement Act after having completed five years of creditable service, may apply as provided in G.S. 7A-53 to become emergency judges of the court from which they retired. The Chief Justice of the Supreme Court may order any emergency judge of the district or superior court who, in his opinion, is competent to perform the duties of a judge of the court from which such judge retired, to hold regular or special sessions of such court, as needed. Order of assignment shall be in writing and entered upon the minutes of the court to which such emergency judge is assigned.

(b) In addition to the compensation or retirement allowance the judge would otherwise be entitled to receive by law, each emergency judge of the district or superior court who is assigned to temporary active service by the Chief Justice shall be paid by the State the judge's actual expenses, plus two hundred dollars (\$200.00) for each day of active service rendered upon recall. No recalled retired trial judge shall receive from the State total annual compensation for judicial services in excess of that received by an active judge of the bench to which the judge is recalled. (1967, c. 108, s. 2; 1973, c. 640, s. 4; 1977, c. 736, s. 3; 1979, c. 878, s. 2; 1981, c. 455, s. 6; c. 859, s. 47; 1981 (Reg. Sess., 1982), c. 1253, s. 3; 1983, c. 784; 1985, c. 698, s. 9(b); 1987, c. 738, s. 132; 1987 (Reg. Sess., 1988), c. 1086, s. 31(b); 1989, c. 116; 1993, c. 321, s. 200.3.)

Editor's Note. —

Session Laws 1993, c. 321, s. 322 is a severability clause.

Effect of Amendments. —

The 1993 amendment, effective August 1, 1993, in the first sentence of sub-

section (b), substituted "the judge" for "he," substituted "the judge's" for "his," and substituted "two hundred dollars (\$200.00)" for "one hundred fifty dollars (\$150.00)."

ARTICLE 9.*District Attorneys and Judicial Districts.***§ 7A-60. (For effective date see note) District attorneys and prosecutorial districts.**

(a) The State shall be divided into prosecutorial districts, as shown in subsection (a1) of this section. There shall be a district attorney for each prosecutorial district, as provided in subsections (b) and (c) of this section who shall be a resident of the prosecutorial district for which elected. A vacancy in the office of district attorney shall be filled as provided in Article IV, Sec. 19 of the Constitution.

(a1) The counties of the State are organized into prosecutorial districts, and each district has the counties and the number of full-time assistant district attorneys set forth in the following table:

<i>Prosecutorial District</i>	<i>Counties</i>	<i>No. of Full-Time Asst. District Attorneys</i>
1	Camden, Chowan, Currituck, Dare, Gates, Pasquotank, Perquimans	7
2	Beaufort, Hyde, Martin, Tyrrell, Washington	4
3A	Pitt	6
3B	Carteret, Craven, Pamlico	6
4	Duplin, Jones, Onslow, Sampson	10
5	New Hanover, Pender	9
6A	Halifax	3
6B	Bertie, Hertford, Northampton	3
7	Edgecombe, Nash, Wilson	10
8	Greene, Lenoir, Wayne	8
9	Franklin, Granville, Vance, Warren	7
9A	Person, Caswell	2
10	Wake	19
11	Harnett, Johnston, Lee	9
12	Cumberland	12
13	Bladen, Brunswick, Columbus	6
14	Durham	9
15A	Alamance	6
15B	Orange, Chatham	5
16A	Scotland, Hoke	3
16B	Robeson	7
17A	Rockingham	4

<i>Prosecutorial District</i>	<i>Counties</i>	<i>No. of Full-Time Asst. District Attorneys</i>
17B	Stokes, Surry	4
18	Guilford	17
19A	Cabarrus	4
19B	Montgomery, Randolph	5
19C	Rowan	4
20	Anson, Moore, Richmond, Stanly, Union	11
21	Forsyth	12
22	Alexander, Davidson, Davie, Iredell	11
23	Alleghany, Ashe, Wilkes, Yadkin	4
24	Avery, Madison, Mitchell, Watauga, Yancey	3
25	Burke, Caldwell, Catawba	11
26	Mecklenburg	23
27A	Gaston	8
27B	Cleveland, Lincoln	5
28	Buncombe	8
29	Henderson, McDowell, Polk, Rutherford, Transylvania	8
30	Cherokee, Clay, Graham, Haywood, Jackson, Macon, Swain.	6

(b) Except as provided in subsection (c) of this section, each district attorney for a prosecutorial district as defined in subsection (a1) of this section, other than District 19B, who is in office on December 31, 1988, shall continue in office for that prosecutorial district, for a term expiring December 31, 1990. In the general election of 1990, and every four years thereafter, a district attorney shall be elected for a four-year term for each prosecutorial district other than Districts 16A and 19B, and shall take office on the January 1 following such election. The district attorney for Prosecutorial District 19B, who is elected in the general election of 1988 for a four-year term beginning January 1, 1989, shall serve that term for Prosecutorial District 19B. In the general election of 1992, and every four years thereafter, a district attorney shall be elected for a four-year term for Prosecutorial Districts 16A and 19B and shall take office on the January 1 following such election.

(c) The office and term of the district attorney for Prosecutorial District 12 formerly consisting of Cumberland and Hoke Counties are allocated to Prosecutorial District 12 as defined by subsection (a1) of this section. The office and the term of the district attorney for former Prosecutorial District 16 consisting of Robeson and Scotland Counties are allocated to Prosecutorial District 16B as defined by subsection (a1) of this section. The initial district attorney for Prosecutorial District 16A as defined in subsection (a1) of this section shall be elected in the general election of November 1988, from nominations made in accordance with G.S. 163-114 as if a vacancy had occurred in nomination, and shall serve an initial term expiring December 31, 1992. In all other respects, subsection (b) of this section shall apply to the district attorneys for Prosecutorial Dis-

tricts 12, 16A, and 16B to the same extent as all other district attorneys. (1967, c. 1049, s. 1; 1975, c. 956, s. 4; 1977, c. 1130, s. 3; 1977, 2nd Sess., c. 1238, s. 2; 1981, c. 964, ss. 2, 3; 1987, c. 509, ss. 4, 5; c. 738, s. 127(a); 1987 (Reg. Sess., 1988), c. 1056, s. 1; c. 1086, s. 111; 1989, c. 770, ss. 1, 56; c. 795, s. 24(a), (e); 1991, c. 742, s. 13; 1991 (Reg. Sess., 1992), c. 900, ss. 120(a), 120(b); 1993, c. 321, ss. 200.4(l), 200.7(a), (b).)

Editor's Note. —

Session Laws 1991 (Reg. Sess., 1992), c. 900, s. 2, provides: "This act shall be known as 'The Current Operations Appropriations Act of 1992.'"

Session Laws 1991 (Reg. Sess., 1992), c. 900, s. 182 is a severability clause.

Session Laws 1993, c. 321, s. 200.4(m), (n) and (p) provide:

"(m) The district attorney position created by subsection (l) of this section shall be filled by appointment by the Governor. This district attorney's term expires on December 31, 1994. The successor shall be elected in the 1994 general election.

"(n) The two assistant district attorney positions for newly created District 9A shall be filled by an assistant district attorney currently serving Person County in District 9 and by an assistant district attorney currently serving Caswell County in District 17A."

"(p) It is the intent of the General Assembly that Superior Court District 17A, District Court District 17A, and Prosecutorial District 17A, as altered by this section, shall remain single-county districts, pursuant to the authority of the General Assembly under Article IV of the North Carolina Constitution to divide the State into a convenient number of districts."

Session Laws 1993, c. 321, s. 200.7(c) and (d) provide:

"(c) The district attorney for newly created Prosecutorial District 19C shall be elected in the 1994 general election for a four-year term beginning January 1, 1995.

"(d) The district attorney for Prosecutorial District 19A shall be elected in the 1994 general election for a four-year term beginning January 1, 1995. The eight assistant district attorney positions currently serving Prosecutorial District 19A shall be allotted as follows: four assistant district attorney positions to newly created Prosecutorial District 19C, and four assistant district attorney positions to Prosecutorial District 19A."

Session Laws 1993, c. 321, s. 322 is a severability clause.

Session Laws 1994, Extra Session, c. 1, s. 1 provides: "Notices of candidacy for district attorney in Prosecutorial District 9A must be filed with the State Board of Elections no earlier than 12:00 noon on the business day after this act is effective under section 5 of the Voting Rights Act of 1965, and not later than 12:00 noon on Friday, March 11, 1994."

Session Laws 1994, Extra Session, c. 1, s. 4(a) provides that the provisions of G.S. 163-107.1 do not apply to any offices covered by c. 1 in the 1994 primary.

Session Laws 1994, Extra Session, c. 1, s. 4(b) provides: "Notwithstanding the provisions of Article 20 or Article 21 of Chapter 163 of the General Statutes, the time by which absentee ballots are required to be printed and distributed for the 1994 primary only is reduced from 50 days to 40 days before the primary election. This subsection applies on a statewide basis and to all offices and to all elections held on that date."

Session Laws 1994, Extra Session, c. 1, s. 5 provides: "Notices of candidacy for 1994 validly filed in:

"(1) Superior Court Districts 3B, 9, 9A, 10A, 15A, 17B, 20B, 25B, and 27B prior to the filing deadline of February 18, 1994;

"(2) Prosecutorial Districts 9 and 17A prior to the filing deadline of February 7, 1994; and

"(3) District Court District 17A prior to the filing deadline of February 7, 1994

are not voided, but shall continue to apply. Except as to Superior Court District 9, Prosecutorial Districts 9 and 17A, and District Court District 17A, they may, however, be withdrawn as provided in G.S. 163-106(e) if such withdrawal is made before the filing deadline established by this act, and in such case the filing fee shall be refunded as provided by G.S. 163-107(b). Provided, that notices of candidacy in District Court District 17A for the seat which is reallocated from District 17A to District 9A by Section 200.4(f) of Chapter 321 of the 1993 Session Laws are voided, and that person's filing fee shall be credited to

any new filing under this act or refunded if the candidate does not file or is not eligible to file."

Session Laws 1994, Extra Session, c. 1, s. 6 provides: "This act is effective upon ratification [February 17, 1994], but may not be enforced except as provided by section 5 of the Voting Rights Act of 1965."

Effect of Amendments. —

The 1991 amendment, effective July 1, 1991, in the column for the number of full-time asst. district attorneys, substituted "9" for "8" for Edgecombe, Nash, and Wilson counties; substituted "17" for "16" for Wake county; substituted "5" for "4" for Alamance county; substituted "7" for "6" for Cabarrus and Rowan counties; substituted "10" for "9" for Anson, Moore, and Richmond counties; substituted "9" for "8" for Alexander, Davidson, and Davie counties; substituted "10" for "9" for Burke, Caldwell, and Catawba counties; substituted "22" for "20" for Mecklenburg county, and substituted "7" for "6" for Henderson, McDowell, and Polk counties.

Session Laws 1991 (Reg. Sess., 1992), c. 900, s. 120(a), effective August 1, 1992, in subsection (a1) changed the number of full-time assistant district attorneys in Carteret, Craven, and Pamlico counties from 5 to 6, in Duplin, Jones, and Onslow counties from 9 to 10, in Bertie, Hertford, and Northampton counties from 2 to 3, in Franklin and Granville counties from 7 to 8, in Alamance county from 5 to 6, in Scotland and Hoke counties from 2 to 3, in Caswell and Rockingham counties from 4 to 5, in Guilford county from 15 to 16, in Cabarrus and Rowan counties from 7 to 8, in Alexander, Davidson, and Davie counties from 9 to 10, in Gaston, Henderson, McDowell, and Polk counties from 7 to 8, and in Buncombe county from 6 to 7.

Session Laws 1991 (Reg. Sess., 1992), c. 900, s. 120(b), effective October 1, 1992, in subsection (a1) changed the number of full-time district attorneys in Pitt county from 5 to 6, in New Hanover and Pender counties from 8 to 9, in

Halifax county from 2 to 3, in Edgecombe, Nash, and Wilson counties from 9 to 10, in Wake county from 17 to 18, in Harnett, Johnston, and Lee counties from 7 to 8, in Cumberland county from 11 to 12, and in Forsyth county from 11 to 12.

Session Laws 1993, c. 321, s. 200.4(l), effective November 1, 1993, or the date upon which subsections 200.4(l) and (m) are approved under Section 5 of the Voting Rights Act of 1965, whichever is later, in subsection (a1), in Prosecutorial District 9, substituted "7" for "8" as the number of full-time Assistant District Attorneys, deleted "Person" from the list of counties in Prosecutorial District 9, added Prosecutorial District 9A, deleted "Caswell" from the list of counties in Prosecutorial District 17A, and in Prosecutorial District 17A substituted "4" for "5" for the number of full-time Assistant District Attorneys. Preclearance was received from the U.S. Department of Justice by letter dated February 14, 1994.

Session Laws 1993, c. 321, s. 200.7(a), effective January 1, 1994, in this section as amended by Session Laws 1993, c. 321, s. 200.4(l), changed the number of Assistant District Attorneys from "6" to "7" in Prosecutorial District 1, from "18" to "19" in Prosecutorial District 10, from "8" to "9" in Prosecutorial District 11, from "4" to "5" in Prosecutorial District 15B, from "16" to "17" in Prosecutorial District 18, from "4" to "5" in Prosecutorial District 19B, from "10" to "11" in Prosecutorial District 20, from "10" to "11" in Prosecutorial District 22, from "10" to "11" in Prosecutorial District 25, from "22" to "23" in Prosecutorial District 26, and from "7" to "8" in Prosecutorial District 28.

Session Laws 1993 c. 321, s. 200.7(b), effective January 1, 1995, in this section as amended by Session Laws 1993, c. 321, s. 200.4(l) and s. 200.7(a), deleted "Rowan" from the list of counties in Prosecutorial District 19A, in Prosecutorial District 19A substituted "4" for "8" for the number of full-time Assistant District Attorneys, and added Prosecutorial District 19C.

CASE NOTES

Defendant failed to meet her burden of proving that pretrial publicity tainted her chances of receiving a fair and impartial trial where of 33 articles submitted, at least three contained potentially exculpatory information and

only one was potentially inflammatory as factual news accounts regarding the commission of a crime and the pretrial proceedings do not of themselves warrant a change of venue. *State v. Moore*, 335 N.C. 567, 440 S.E.2d 797 (1994).

Cited in *State v. Soyars*, 332 N.C. 47, 418 S.E.2d 480 (1992).

§ 7A-61. Duties of district attorney.

CASE NOTES

Responsibility to Prosecute Vested in District Attorneys. — The clear mandate of N.C. Const., Art. IV, § 18 is that the responsibility and authority to prosecute all criminal actions in the superior courts is vested solely in the several district attorneys of the State. *State v. Camacho*, 329 N.C. 589, 406 S.E.2d 868 (1991).

Delegation of Prosecutorial Function. — The elected district attorney may, in his or her discretion and where otherwise permitted by law, delegate the prosecutorial function to others. *State v. Camacho*, 329 N.C. 589, 406 S.E.2d 868 (1991).

Prosecution by Special Prosecution Division. — Section 114-11.6 authorizes the several elected district attorneys of the State to permit the Special Prosecution Division of the Office of the Attorney General to prosecute individual criminal cases in their prosecutorial districts. *State v. Camacho*, 329 N.C. 589, 406 S.E.2d 868 (1991).

When Requested by District Attorneys. — When § 114-11.6 is read in pari materia with N.C. Const., Art. IV, § 18, it is apparent that our Constitution and statutes give the district attorneys of the State the exclusive discretion and authority to determine whether to request, and thus permit, the prosecution of any individual case by the Special Prosecu-

tion Division. *State v. Camacho*, 329 N.C. 589, 406 S.E.2d 868 (1991).

Disqualification of Prosecutor for Conflict of Interests. — A prosecutor may not be disqualified from prosecuting a criminal action in this State unless and until the trial court determines that an actual conflict of interests exists. In this context, an "actual conflict of interests" is demonstrated where a district attorney or a member of his or her staff has previously represented the defendant with regard to the charges to be prosecuted and, as a result of that former attorney-client relationship, the prosecution has obtained confidential information which may be used to the defendant's detriment at trial. Any order of disqualification ordinarily should be directed only to individual prosecutors who have been exposed to such information. *State v. Camacho*, 329 N.C. 589, 406 S.E.2d 868 (1991).

Order to Withdraw Held Improper. — The trial court exceeded its authority by ordering that in order to avoid the possibility or impression of any conflict of interest, the district attorney and his entire staff must withdraw from a capital case and have no further participation either directly or indirectly with regard to the case. *State v. Camacho*, 329 N.C. 589, 406 S.E.2d 868 (1991).

Cited in *Robeson Defense Comm. v. Britt*, 914 F.2d 505 (4th Cir. 1990).

§ 7A-62. Acting district attorney.

CASE NOTES

The trial court exceeded its authority and invaded the province of an independent constitutional officer when it ordered the district attorney to re-

quest that the Attorney General prosecute defendant in a capital case. *State v. Camacho*, 329 N.C. 589, 406 S.E.2d 868 (1991).

§ 7A-69. Investigatorial assistants.

The district attorney in the first, third-B, fourth, seventh, eighth, tenth, eleventh, twelfth, fourteenth, fifteenth-A, sixteenth, eighteenth, twentieth, twenty-first, twenty-fifth, twenty-sixth, twenty-seventh, twenty-eighth, twenty-ninth and thirtieth prosecutorial districts is entitled to one investigatorial assistant to be appointed by the district attorney and to serve at his pleasure. It shall be the duty of the investigatorial assistant to investigate cases preparatory to trial and to perform such other duties as may be assigned by the district attorney. The investigatorial assistant is entitled to reimbursement for his subsistence and travel expenses to the same extent as State employees generally. (1975, c. 956, s. 6; 1977, c. 969, s. 1; 1981, c. 964, s. 2; 1993, c. 321, s. 200.7(e).)

Editor's Note. —
Session Laws 1993, c. 321, s. 322 is a severability clause.
Effect of Amendments. — The 1993 amendment, effective January 1, 1994,

in the first sentence, inserted "first" preceding "third-B", inserted "eighth" preceding "tenth" and substituted "prosecutorial districts" for "judicial districts".

ARTICLE 12.

Clerk of Superior Court.

§ 7A-101. Compensation.

(a) The clerk of superior court is a full-time employee of the State and shall receive an annual salary, payable in equal monthly installments, based on the population of the county as determined in subsection (a1) of this section, according to the following schedule:

<i>Population</i>	<i>Annual Salary</i>
Less than 100,000	\$57,670
100,000 to 149,999	64,780
150,000 to 249,999	71,890
250,000 and above	79,000.

The salary schedule in this subsection is intended to represent the following percentage of the salary of a chief district court judge:

<i>Population</i>	<i>Annual Salary</i>
Less than 100,000	73%
100,000 to 149,999	82%
150,000 to 249,999	91%
250,000 and above	100%.

When a county changes from one population group to another, the salary of the clerk shall be changed, on July 1 of the fiscal year for which the change is reported, to the salary appropriate for the new population group, except that the salary of an incumbent clerk shall not be decreased by any change in population group during his continuance in office.

(a1) For purposes of subsection (a) of this section, the population of a county for any fiscal year shall be the population for the beginning of that fiscal year as reported by the Office of State Planning

to the Administrative Office of the Courts prior to the beginning of that fiscal year.

(b) The clerk shall receive no fees or commission by virtue of his office. The salary set forth in this section is the clerk's sole official compensation, but if, on June 30, 1975, the salary of a particular clerk, by reason of previous but no longer authorized merit increments, is higher than that set forth in the table, that higher salary shall not be reduced during his continuance in office.

(c) In lieu of merit and other increment raises paid to regular State employees, a clerk of superior court shall receive as longevity pay an amount equal to four and eight-tenths percent (4.8%) of the clerk's annual salary payable monthly after five years of service, nine and six-tenths percent (9.6%) after 10 years of service, fourteen and four-tenths percent (14.4%) after 15 years of service, and nineteen and two-tenths percent (19.2%) after 20 years of service. Service shall mean service in the elective position of clerk of superior court, as an assistant clerk of court and as a supervisor of clerks of superior court with the Administrative Office of the Courts and shall not include service as a deputy or acting clerk. Service shall also mean service as a justice or judge of the General Court of Justice or as a district attorney. (1965, c. 310, s. 1; 1967, c. 691, s. 5; 1969, c. 1186, s. 3; 1971, c. 877, ss. 1, 2; 1973, c. 571, ss. 1, 2; 1975, c. 956, s. 7; 1975, 2nd Sess., c. 983, s. 11; 1977, c. 802, s. 42; 1977, 2nd Sess., c. 1136, s. 13; 1979, c. 838, s. 85; 1979, 2nd Sess., c. 1137, s. 12; 1981, c. 964, s. 14; c. 1127, s. 12; 1983, c. 761, ss. 200, 247, 249; 1983 (Reg. Sess., 1984), c. 1034, ss. 86, 87; c. 1109, s. 13.1; 1985, c. 479, s. 211; c. 689, s. 3; c. 698, s. 10(c); 1985 (Reg. Sess., 1986), c. 1014, s. 34; 1987, c. 738, s. 20; 1987 (Reg. Sess., 1988), c. 1086, s. 14; c. 1100, ss. 16(a), 17; 1989, c. 752, s. 31; c. 799, s. 27(a); 1991 (Reg. Sess., 1992), c. 900, s. 40; c. 1039, s. 21; 1993, c. 321, s. 57(a); 1993 (Reg. Sess., 1994), c. 769, s. 7.10(a).)

Editor's Note. —

Session Laws 1991 (Reg. Sess., 1992), c. 900, s. 2, provides: "This act shall be known as 'The Current Operations Appropriations Act of 1992.'"

Session Laws 1991 (Reg. Sess., 1992), c. 900, s. 182 is a severability clause.

Session Laws 1993, c. 321, which amended this section, in s. 57(b) provides: "The increase required for the new annual salaries provided in subsection (a) of this section shall be funded from funds available to the Administrative Office of the Courts for fiscal years 1993-94 and 1994-95."

Session Laws 1993, c. 321, s. 321 provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 1993-95 biennium, the textual provisions of this act shall apply only to funds appropriated for and activities occurring during the 1993-95 biennium."

Session Laws 1993, c. 321, s. 322 is a severability clause.

Session Laws 1993 (Reg. Sess., 1994), c. 769, s. 7.10(b) provides: "The increase

required for the new annual salaries provided in subsection (a) of this section shall be funded from funds available to the Administrative Office of the Courts for the fiscal year 1994-95."

Session Laws 1993 (Reg. Sess., 1994), c. 769, s. 2 provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 1994.'"

Session Laws 1993 (Reg. Sess., 1994), c. 769, s. 43.5 is a severability clause.

Effect of Amendments. —

Session Laws 1991 (Reg. Sess., 1992), c. 900, s. 40, effective July 1, 1992, rewrote subsection (a), and added subsection (a1).

Session Laws 1991 (Reg. Sess., 1992), c. 1039, s. 21, effective July 24, 1992, substituted "the clerk's annual salary" for "the annual salary set forth in the Budget Appropriation Act" in the first sentence of subsection (c).

The 1993 amendment, effective July 1, 1993, in subsection (a), substituted "149,999" for "199,999", substituted "150,000 to 249,999" for "200,000 and

above", added "250,000 and above", deleted "1992-93" under "Annual Salary", substituted "\$48,391" for "\$47,442," substituted "54,621" for "53,550", substituted "62,247" for "61,026" and added "68,256".

The 1993 (Reg. Sess., 1994) amend-

ment, effective July 1, 1994, changed the salaries in the schedule in the first paragraph of subsection (a) from \$48,391 to \$57,670, from \$54,621 to \$64,780, from \$62,247 to \$71,890, and from \$68,256 to \$79,000, and added the second paragraph of that subsection.

§ 7A-102. Assistant and deputy clerks; appointment; number; salaries; duties.

(a) The numbers and salaries of assistant clerks, deputy clerks, and other employees in the office of each clerk of superior court shall be determined by the Administrative Officer of the Courts after consultation with the clerk concerned. All personnel in the clerk's office are employees of the State. The clerk appoints the assistants, deputies, and other employees in his office to serve at his pleasure. Assistant and deputy clerks shall take the oath of office prescribed for clerks of superior court, conformed to the office of assistant or deputy clerk, as the case may be. The job classifications and related salaries of each employee within the office of each superior court clerk shall be subject to the approval of the Administrative Officer of the Courts after consultation with each clerk concerned and shall be subject to the availability of funds appropriated for that purpose by the General Assembly.

(b) An assistant clerk is authorized to perform all the duties and functions of the office of clerk of superior court, and any act of an assistant clerk is entitled to the same faith and credit as that of the clerk. A deputy clerk is authorized to certify the existence and correctness of any record in the clerk's office, to take the proofs and examinations of the witnesses touching the execution of a will as required by G.S. 31-17, and to perform any other ministerial act which the clerk may be authorized and empowered to do, in his own name and without reciting the name of his principal. The clerk is responsible for the acts of his assistants and deputies. With the consent of the clerk of superior court of each county and the consent of the presiding judge in any proceeding, an assistant or deputy clerk is authorized to perform all the duties and functions of the office of the clerk of superior court in another county in any proceeding in the district or superior court that has been transferred to that county from the county in which the assistant or deputy clerk is employed.

(c) Notwithstanding the provisions of subsection (a), the Administrative Officer of the Courts shall establish an incremental salary plan for assistant clerks and for deputy clerks based on a series of salary steps corresponding to the steps contained in the Salary Plan for State Employees adopted by the Office of State Personnel, subject to a minimum and a maximum annual salary as set forth below. On and after July 1, 1985, each assistant clerk and each deputy clerk shall be eligible for an annual step increase in his salary plan based on satisfactory job performance as determined by each clerk. Notwithstanding the foregoing, if an assistant or deputy clerk's years of service in the office of superior court clerk would warrant an annual salary greater than the salary first established under this section, that assistant or deputy clerk shall be eligible on and after July 1, 1984, for an annual step increase in his salary

plan. Furthermore, on and after July 1, 1985, that assistant or deputy clerk shall be eligible for an increase of two steps in his salary plan, and shall remain eligible for a two-step increase each year as recommended by each clerk until that assistant or deputy clerk's annual salary corresponds to his number of years of service. Any person covered by this subsection who would not receive a step increase in fiscal year 1994-95 because that person is at the top of the salary range as it existed for fiscal year 1993-94 shall receive a salary increase to the maximum annual salary provided by subsection (c1) of this section.

(c1) A full-time assistant clerk or a full-time deputy clerk, and up to one full-time deputy clerk serving as head bookkeeper per county, shall be paid an annual salary subject to the following minimum and maximum rates:

<i>Assistant Clerks and Head Bookkeeper</i>	<i>Annual Salary</i>
Minimum	\$21,126
Maximum	37,406
 <i>Deputy Clerks</i>	 <i>Annual Salary</i>
Minimum	\$16,891
Maximum	28,813.

(d) Full-time assistant clerks, licensed to practice law in North Carolina, who are employed in the office of superior court clerk on and after July 1, 1984, are authorized an annual salary of not less than three-fourths of the maximum annual salary established for assistant clerks; the clerk of superior court, with the approval of the Administrative Office of the Courts, may establish a higher annual salary but that salary shall not be higher than the maximum annual salary established for assistant clerks. Full-time assistant clerks, holding a law degree from an accredited law school, who are employed in the office of superior court clerk on and after July 1, 1984, are authorized an annual salary of not less than two-thirds of the maximum annual salary established for assistant clerks; the clerk of superior court, with the approval of the Administrative Office of the Courts, may establish a higher annual salary, but the entry-level salary may not be more than three-fourths of the maximum annual salary established for assistant clerks, and in no event may be higher than the maximum annual salary established for assistant clerks. The entry-level annual salary for all other assistant and deputy clerks employed on and after July 1, 1984, shall be at the minimum rates as herein established. (1777, c. 115, s. 86; P.R.; R.C., c. 19, s. 15; Code, s. 75; 1899, c. 235, ss. 2, 3; Rev., ss. 898-900; 1921, c. 32, ss. 1-3; C.S., ss. 934(a)-934(c), 935-937; 1951, c. 159, ss. 1, 2; 1959, c. 1297; 1963, c. 1187; 1965, c. 264; c. 310, s. 1; 1971, c. 363, s. 2; 1973, c. 678; 1983 (Reg. Sess., 1984), c. 1034, ss. 88, 89; 1985, c. 479, s. 212; c. 757, s. 190; 1985 (Reg. Sess., 1986), c. 1014, s. 35; 1987, c. 738, s. 21(a); 1987 (Reg. Sess., 1988), c. 1086, s. 15; 1989, c. 445; c. 752, s. 32; 1991 (Reg. Sess., 1992), c. 900, ss. 42, 119; 1993, c. 321, ss. 58, 59; 1993 (Reg. Sess., 1994), c. 769, ss. 7.11, 7.12.)

Editor's Note. —

Session Laws 1991, c. 689, s. 212 provides: "Notwithstanding the provisions of G.S. 7A-102(c), assistant clerks and

deputy clerks of superior court shall not receive any automatic increment during the 1991-92 fiscal year."

Section 352 of Session Laws 1991, c.

689, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 1991-93 biennium, the textual provisions of Titles I, II, and III of this act shall apply only to funds appropriated for and activities occurring during the 1991-93 biennium."

Session Laws 1991 (Reg. Sess., 1992), c. 900, s. 49 provides: "Notwithstanding the provisions of Section 19.1 of Chapter 1137 of the 1979 Session Laws, as amended by Chapter 1053 of the 1981 Session Laws, G.S. 115C-12(9)a., 115C-12(16), 126-7, or any other provision of law other than G.S. 20-187.3(a) and G.S. 7A-102(c), no employee or officer of the public school system shall receive an automatic increment, and no State employee or officer shall receive a merit increment during the 1992-93 fiscal year, except as otherwise permitted by this act."

Session Laws 1991 (Reg. Sess., 1992), c. 900, s. 2, provides: "This act shall be known as 'The Current Operations Appropriations Act of 1992.'"

Session Laws 1991 (Reg. Sess., 1992), c. 900, s. 182 is a severability clause.

Session Laws 1993, c. 321, s. 322 is a severability clause.

Session Laws 1993 (Reg. Sess., 1994), c. 769, s. 7.19(f) provides: "The provisions of this section [s. 7.19 of c. 769, which provided certain salary increases for state employees] shall be applied to employees whose salaries are determined in accordance with G.S. 7A-102 at two percent (2%) rather than four percent (4%), except that employees who would not receive a salary increment for the 1994-95 fiscal year under G.S. 7A-102 because they are at the top of their salary range will be moved to the new top of their salary range, which is increased by four percent (4%). The salary ranges for employees covered by G.S. 7A-102 set out in Section 7.12 of this act reflect this action."

Session Laws 1993 (Reg. Sess., 1994), c. 769, s. 2 provides: "This act shall be

known as 'The Current Operations and Capital Improvements Appropriations Act of 1994.'"

Session Laws 1993 (Reg. Sess., 1994), c. 769, s. 43.2 provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 1994-95 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 1994-95 fiscal year."

Session Laws 1993 (Reg. Sess., 1994), c. 769, s. 43.5 is a severability clause.

Effect of Amendments. —

The 1991 (Reg. Sess., 1992) amendment, effective July 1, 1992, added the last sentence in present subsection (c), redesignated language formerly of subsection (c) as subsection (c1), and in subsection (c1) deleted annual salary provisions for the years 1989 through 1991, and added the provisions for 1992 through 1993, and rewrote subsection (d).

The 1993 amendment, effective July 1, 1993, in the last sentence of subsection (c), substituted "1993-94" for "1992-93", substituted "1992-93" for "1990-91" and deleted "for fiscal year 1992-93" preceding "by subsection (c1)"; and in subsection (c1), twice deleted "1992-93" under "Annual Salary", substituted "35,967" for "35,262", substituted "\$16,560" for "\$16,236", and substituted "27,705" for "\$27,162".

The 1993 (Reg. Sess., 1994) amendment, effective July 1, 1994, substituted "1994-95" for "1993-94" and "1993-94" for "1992-93" in the last sentence of subsection (c); and, in subsection (c1), inserted "and up to one full-time deputy clerk serving as head bookkeeper per county" in the introductory language, inserted "and Head Bookkeeper" in the heading in the first table, substituted "\$21,126" for "\$20,712" and "37,406" for "35,967" in the first table, and substituted "\$16,891" for "\$16,560" and "28,813" for "27,705" in the second table.

§ 7A-103. Authority of clerk of superior court.

CASE NOTES

Partial Payment Allocated to Principal First. — When payment is made on a debt which has accumulated interest but the payment is not high enough to satisfy the principal and interest, in

order to encourage debtors to pay the entire amount due and in the interest of fairness, when payments are made on a judgment debt, the clerk should first allocate the payment to the interest due,

and the remainder of the payment should be allocated to the principal. *Morley v. Morley*, 102 N.C. App. 713, 403 S.E.2d 574 (1991).

Applied in *Little v. Bennington*, 109 N.C. App. 482, 427 S.E.2d 887.

§ 7A-109. Record-keeping procedures.

Records of Weapons Permits in Certain Counties. — Duplin was deleted from the list of counties in Session Laws 1959, c. 1073, s. 4, as referred to in the main volume, by Session Laws 1993, c. 106, effective June 2, 1993; Mitchell was deleted from the list by Session Laws 1993, c. 48, effective May 18, 1993; Pender was deleted from the list by Session Laws 1989 (Reg. Sess., 1990), c. 910; Perquimans was deleted from the list by Session Laws 1993, c. 64, effective May 24, 1993.

Editor's Note. —

Tyrrell was deleted from the list of

counties by Session Laws 1993 (Reg. Sess., 1994), c. 581, s. 1, effective June 30, 1994.

Polk, Madison, and Yancey were deleted from the list of counties by Session Laws 1993 (Reg. Sess., 1994), c. 634, s. 1, effective July 1, 1994.

Session Laws 1993 (Reg. Sess., 1994), c. 634, s. 2 provides that Article 52A of Chapter 14 of the General Statutes shall apply to Polk, Madison, and Yancey counties.

CASE NOTES

Cited in *In re Alamance County Ct. Facilities*, 329 N.C. 84, 405 S.E.2d 125 (1991); *WSOC Television, Inc. v. State*

ex rel. Att'y Gen., 107 N.C. App. 448, 420 S.E.2d 682 (1992).

§ 7A-112. (See editor's note for date change) Investment of funds in clerk's hands.

(a) The clerk of the superior court may in his discretion invest moneys secured by virtue or color of the clerk's office or as receiver in any of the following securities:

- (1) Obligations of the United States or obligations fully guaranteed both as to principal and interest by the United States;
- (2) Obligations of the State of North Carolina;
- (3) Obligations of North Carolina cities or counties approved by the Local Government Commission; and
- (4) Shares of any building and loan association organized under the laws of this State, or of any federal savings and loan association having its principal office in this State, and certificates of deposit for time deposits or savings accounts in any bank or trust company authorized to do business in North Carolina, to the extent in each instance that such shares or deposits are insured by the State or federal government or any agency thereof or by any mutual deposit guaranty association authorized by the Administrator of the Savings Institutions Division of North Carolina to do business in North Carolina pursuant to Article 7A of Chapter 54 of the General Statutes. If the clerk desires to deposit in a bank, saving and loan, or trust company funds entrusted to the clerk by virtue or color of the clerk's office, beyond the extent that such deposits are insured by the State or federal government or an agency thereof or by any

mutual deposit guaranty association authorized by the Administrator of the Savings Institutions Division of North Carolina to do business in North Carolina pursuant to Article 7A of Chapter 54 of the General Statutes, the clerk shall require such depository to furnish a corporate surety bond or obligations of the United States or obligations fully guaranteed both as to principal and interest by the United States or obligations of the State of North Carolina, or of counties and municipalities of North Carolina whose obligations have been approved by the Local Government Commission.

(b) When money in a single account in excess of two thousand dollars (\$2,000) is received by the clerk by virtue or color of his office and it can reasonably be expected that the money will remain on deposit with the clerk in excess of six months from date of receipt, the money exceeding two thousand dollars (\$2,000) shall be invested by the clerk within 60 days of receipt in investments authorized by this section. The first two thousand dollars (\$2,000) of these accounts and money in a single account totaling less than two thousand dollars (\$2,000), received by the clerk by virtue or color of his office, shall be invested, or administered, or invested and administered, by the clerk in accordance with regulations promulgated by the Administrative Officer of the Courts. This subsection shall not apply to cash bonds or to money received by the clerk to be disbursed to governmental units.

(c) The State Auditor is hereby authorized and empowered to inspect the records of the clerk to insure compliance with this section, and he shall report noncompliance with the provisions of this section to the Administrative Officer of the Courts.

(d) **(Effective October 1, 1994 — See editor's note)** It shall be unlawful for the clerk of the superior court of any county receiving any money by virtue or color of his office to apply or invest any of it except as authorized under this section. Any clerk violating the provisions of this section shall be guilty of a Class 1 misdemeanor. (1931, c. 281, ss. 1-3, 5; 1937, c. 188; 1939, cc. 86, 110; 1943, c. 543; 1971, c. 363, s. 9; c. 956, s. 1; 1973, c. 1446, s. 4; 1975, c. 496, ss. 1, 2; 1989, c. 76, s. 13; 1993, c. 539, s. 4; 1994, Ex. Sess., c. 24, s. 14(c); 1993 (Reg. Sess., 1994), c. 656, s. 1.)

Editor's Note. —

Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Effect of Amendments. —

The 1993 amendment, effective Octo-

ber 1, 1994, and applicable to offenses occurring on or after that date, inserted "Class 1" preceding "misdemeanor" in subsection (d).

The 1993 (Reg. Sess., 1994) amendment, effective July 1, 1994, in subdivision (a)(4), in the second sentence substituted "obligations of the United States or obligations fully guaranteed both as to principal and interest by the United States or obligations" for "bonds of the United States government or," substituted "whose obligations" for "whose bonds," and made stylistic changes.

SUBCHAPTER IV. DISTRICT COURT DIVISION OF THE GENERAL COURT OF JUSTICE.

ARTICLE 13.

Creation and Organization of the District Court Division.

§ 7A-133. (See editor's note) Numbers of judges by districts; numbers of magistrates and additional seats of court, by counties.

Each district court district shall have the numbers of judges and each county within the district shall have the numbers of magistrates and additional seats of court, as set forth in the following table:

District	Judges	County	Magistrates Min.-Max.		Additional Seats of Court
1	3	Camden	1	2	
		Chowan	2	3	
		Currituck	1	2	
		Dare	3	8	
		Gates	2	3	
		Pasquotank	3	4	
		Perquimans	2	3	
2	3	Martin	5	8	
		Beaufort	4	8	
		Tyrrell	1	3	
		Hyde	2	4	
		Washington	3	4	
3A	3	Pitt	10	12	Farmville Ayden
3B	4	Craven	7	10	Havelock
		Pamlico	2	3	
		Carteret	5	8	
4	6	Sampson	6	8	
		Duplin	9	11	
		Jones	2	3	
		Onslow	8	14	
		New Hanover	6	11	
5	6	Pender	4	6	
6A	2	Halifax	9	14	Roanoke Rapids, Scotland Neck
6B	3	Northampton	5	6	
		Bertie	4	5	
		Hertford	5	6	
7	6	Nash	7	10	Rocky Mount
		Edgecombe	4	6	Rocky Mount
		Wilson	4	6	
8	5	Wayne	5	11	Mount Olive
		Greene	2	4	
		Lenoir	4	10	La Grange

District	Judges	County	Magistrates Min.-Max.		Additional Seats of Court
9	4	Granville	3	7	
		Vance	3	5	
		Warren	3	4	
		Franklin	3	6	
9A	2	Person	3	4	
		Caswell	2	5	
10	12	Wake	12	20	Apex, Wendell, Fuquay- Varina, Wake Forest
11	6	Harnett	7	11	Dunn
		Johnston	10	12	Benson, Clayton and Selma
		Lee	4	6	
12	6	Cumberland	10	17	
13	4	Bladen	4	6	
		Brunswick	4	7	
		Columbus	6	8	Tabor City
14	5	Durham	8	12	
15A	3	Alamance	7	10	Burlington
15B	3	Orange	4	11	Chapel Hill
		Chatham	3	8	Siler City
16A	2	Scotland	3	5	
		Hoke	4	5	
16B	5	Robeson	8	16	Fairmont, Maxton, Pembroke, Red Springs, Rowland, St. Pauls
17A	2	Rockingham	4	9	Reidsville, Eden, Madison
17B	3	Stokes	2	5	
		Surry	5	8	Mt. Airy
18	10	Guilford	20	26	High Point
19A	3	Cabarrus	5	9	Kannapolis
19B	3	Montgomery	2	4	
		Randolph	5	8	Liberty
19C	3	Rowan	5	10	
20	6	Stanly	5	6	
		Union	4	6	
		Anson	4	5	
		Richmond	5	6	Hamlet
		Moore	5	8	Southern Pines
21	7	Forsyth	3	15	Kernersville
22	7	Alexander	2	3	
		Davidson	7	10	Thomasville
		Davie	2	3	
		Iredell	4	9	Mooresville
23	3	Alleghany	1	2	
		Ashe	3	4	
		Wilkes	4	6	
		Yadkin	3	5	
24	3	Avery	3	4	
		Madison	4	5	

District	Judges	County	Magistrates Min.-Max.		Additional Seats of Court
25	7	Mitchell	3	4	Hickory
		Watauga	4	6	
		Yancey	2	4	
		Burke	4	7	
		Caldwell	4	7	
26	14	Catawba	6	10	
		Mecklenburg	15	26	
27A	5	Gaston	11	20	
27B	4	Cleveland	5	8	
		Lincoln	4	6	
28	5	Buncombe	6	15	
29	4	Henderson	4	6	
		McDowell	3	5	
		Polk	3	4	
		Rutherford	6	8	
		Transylvania	2	4	
30	4	Cherokee	3	4	Canton
		Clay	1	2	
		Graham	2	3	
		Haywood	5	7	
		Jackson	3	4	
		Macon	3	4	
		Swain	2	3	

(1965, c. 310, s. 1; 1967, c. 691, s. 8; 1969, c. 1190, s. 10; c. 1254; 1971, c. 377, s. 7; cc. 727, 840, 841, 842, 843, 865, 866, 898; 1973, cc. 132, 373, 483; c. 838, s. 1; c. 1376; 1975, c. 956, ss. 8, 10; 1977, cc. 121, 122; c. 678, s. 2; c. 947, s. 1; c. 1130, ss. 4, 5; 1977, 2nd Sess., c. 1238, s. 3; c. 1243, ss. 3, 6; 1979, c. 465; c. 838, ss. 117, 118; c. 1072, ss. 2, 3; 1979, 2nd Sess., c. 1221, s. 2; 1981, c. 964, s. 4; 1983, c. 881, s. 5; 1983 (Reg. Sess., 1984), c. 1109, s. 5; 1985, c. 698, ss. 7(a), 12; 1985 (Reg. Sess., 1986), c. 1014, s. 222; 1987, c. 738, ss. 126(a), 130(a); 1987 (Reg. Sess., 1988), c. 1056, s. 4; c. 1075; c. 1100, s. 17.2(a); 1989, c. 795, s. 23(a), (d), (h); 1991, c. 742, ss. 11, 12(a); 1993, c. 321, ss. 200.4(e), 200.6(a), (d); 1993 (Reg. Sess., 1994), c. 769, s. 24.9.)

Editor's Note. —

Session Laws 1993, c. 321, s. 200.4(f), (g), (h), (i), and (p) provide:

"(f) The two district court judgeships created by subsection (e) of this section shall be filled by the district court judge from current District 9 who resides in Person County and by the district court judge from current District 17A who resides in Caswell County. The term of the judge residing in Caswell County expires December 31, 1994. This judge's successor shall be elected in the 1994 general election. The term of the judge residing in Person County expires December 31, 1996. This judge's successor shall be elected in the 1996 general election.

"(g) Secretarial services for the chief district court judge in newly created Dis-

trict 9A shall be provided by the secretary of the superior court judge in newly created Superior Court District 9A, created by subsection (a) of this section.

"(h) The magistrates' positions created by subsection (e) of this section for Person County in newly created District 9A shall be filled by the magistrates currently serving Person County in District 9. The magistrates' positions created by subsection (e) of this section for Caswell County in newly created District 9A shall be filled by the magistrates currently serving Caswell County in District 17A.

"(i) Juvenile intake, probation, and aftercare services for newly created District 9A shall be provided by the chief court counselor's office in District 17A. One such position serving the chief court

counselor's office in current District 9 shall be transferred to District 17A to facilitate the provision of juvenile intake, probation, and aftercare services to newly created District 9A.

"(p) It is the intent of the General Assembly that Superior Court District 17A, District Court District 17A, and Prosecutorial District 17A, as altered by this section, shall remain single-county districts, pursuant to the authority of the General Assembly under Article IV of the North Carolina Constitution to divide the State into a convenient number of districts."

Session Laws 1993 c. 321, s. 200.6(b) provides:

"(b) The Governor shall appoint additional district court judges for district court districts 1, 8, 10, 12, 18, and 30 as authorized by subsection (a) of this section. Their successors shall be elected in the 1996 general election for four-year terms commencing the first Monday in December 1996."

Session Laws 1993, c. 301, s. 200.6(e) provides:

"(e) The additional district court judges for district court districts 3A, 6B, 19A, 19C, 20, 22, and 26 shall be elected in the 1994 general election for four-year terms commencing the first Monday in December 1994."

Session Laws 1993, c. 321, s. 321 provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 1993-95 biennium, the textual provisions of this act shall apply only to funds appropriated for and activities occurring during the 1993-95 biennium."

Session Laws 1993, c. 321, s. 322 is a severability clause.

Session Laws 1994, Extra Session, c. 1, s. 2 provides: "Notices of candidacy for district court judges in District Court Districts 6B and 9A must be filed with the State Board of Elections no earlier than 12:00 noon on the business day after this act is effective under section 5 of the Voting Rights Act of 1965, and not later than 12:00 noon on Friday, March 11, 1994."

Session Laws 1994, Extra Session, c. 1, s. 4(a) provides that the provisions of G.S. 163-107.1 do not apply to any offices covered by s. 1 in the 1994 primary.

Session Laws 1994, Extra Session, c. 1, s. 4(b) provides: "Notwithstanding the provisions of Article 20 or Article 21 of Chapter 163 of the General Statutes, the time by which absentee ballots are re-

quired to be printed and distributed for the 1994 primary only is reduced from 50 days to 40 days before the primary election. This subsection applies on a statewide basis and to all offices and to all elections held on that date."

Session Laws 1994, Extra Session, c. 1, s. 5 provides: "Notices of candidacy for 1994 validly filed in:

"(1) Superior Court Districts 3B, 9, 9A, 10A, 15A, 17B, 20B, 25B, and 27B prior to the filing deadline of February 18, 1994;

"(2) Prosecutorial Districts 9 and 17A prior to the filing deadline of February 7, 1994; and

"(3) District Court District 17A prior to the filing deadline of February 7, 1994

are not voided, but shall continue to apply. Except as to Superior Court District 9, Prosecutorial Districts 9 and 17A, and District Court District 17A, they may, however, be withdrawn as provided in G.S. 163-106(e) if such withdrawal is made before the filing deadline established by this act, and in such case the filing fee shall be refunded as provided by G.S. 163-107(b). Provided, that notices of candidacy in District Court District 17A for the seat which is reallocated from District 17A to District 9A by Section 200.4(f) of Chapter 321 of the 1993 Session Laws are voided, and that person's filing fee shall be credited to any new filing under this act or refunded if the candidate does not file or is not eligible to file."

Session Laws 1994, Extra Session, c. 1, s. 6 provides: "This act is effective upon ratification [February 17, 1994], but may not be enforced except as provided by section 5 of the Voting Rights Act of 1965."

Session Laws 1993 (Reg. Sess., 1994), c. 769, s. 2 provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 1994.'"

Session Laws 1993 (Reg. Sess., 1994), c. 769, s. 43.2 provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 1994-95 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 1994-95 fiscal year."

Session Laws 1993 (Reg. Sess., 1994), c. 769, s. 43.5 is a severability clause.

Effect of Amendments. —

Session Laws 1991, c. 742, s. 11, effec-

tive July 1, 1991, in the second column providing for magistrates Max., substituted "8" for "5" for Dare and Beaufort counties, substituted "14" for "11" for Onslow county, substituted "11" for "8" for Wayne county, substituted "10" for "7" for Lenoir county, substituted "20" for "17" for Wake county, substituted "11" for "9" for Orange county and substituted "8" for "6" for Chatham county.

Session Laws 1991, c. 742, s. 12, effective September 1, 1991, redesignated former district 3 as present districts 3A and 3B, where Pitt county makes up district 3A and is allotted three judges, and Craven, Pamlico and Carteret counties composed district 3B and are allotted four judges.

Session Laws 1993, c. 321, s. 200.4(e), effective November 1, 1993, or the date upon which s. 200.4(e) and (f) are approved under section 5 of the Voting Rights Act, whichever is later, in District 9 changed the number of Judges from "5" to "4", deleted "Person" from the list of counties and the minimum and maximum number of Magistrates; added District 9A; and in District 17A changed the number of Judges from "3" to "2" and deleted "Caswell" from the list of counties and the minimum and maximum number of Magistrates. Preclearance was received from the U.S. Department of Justice by letter dated February 14, 1994.

Session Laws 1993 c. 321, s. 200.6(a), as amended by Session Laws 1994, Extra Session, c. 6, ss. 1 and 2, effective November 1, 1993, or 15 days after the date upon which s. 200.6(a) and (b) are approved under section 5 of the Voting Rights Act of 1965, whichever is later, except as to the additional district court judges in Districts 10 and 30 authorized by s. 200.6(a) and (b), effective March 1, 1994, in District 1 changed the number of judges from "3" to "4"; in District 8 changed the number of judges from "5" to "6"; in District 10 changed the num-

ber of judges from "11" to "12"; in District 12 changed the number of judges from "6" to "7"; in District 18 changed the number of judges from "10" to "11"; and in District 30 changed the number of judges from "3" to "4". Preclearance was received from the U.S. Department of Justice by letter dated February 14, 1994, except for the amendments relating to Districts 1, 8, 12, and 18, which were objected to, and which will not be given effect. Session Laws 1994, Extra Session, c. 6, s. 2 further provides: "If additional judges authorized by subsection (a) of this section, but not all the judges authorized by that subsection, are approved under section 5 of the Voting Rights Act of 1965, then as to those additional judges, subsections (a) and (b) of this section become effective 15 days after the date of approval."

Session Laws 1993, c. 321, s. 200.6(d), effective December 1, 1994, in this section as amended by Session Laws 1993, c. 321, ss. 200.4(e) and 200.6(a), in District 3A substituted "4" for "3" for the number of Judges; in District 6B substituted "3" for "2" for the number of Judges; in District 19A substituted "3" for "2" for the number of Judges; in District 19C substituted "3" for "2" for the number of Judges; in District 20 substituted "7" for "6" for the number of Judges; in District 22 substituted "7" for "6" for the number of Judges; and in District 26 substituted "14" for "13" for the number of Judges. Preclearance was received from the U.S. Department of Justice by letter dated February 14, 1994, except for the amendments relating to Districts 3A and 20, which were objected to, and which will not be given effect.

Session Laws 1993 (Reg. Sess., 1994), c. 769, s. 24.9, effective July 1, 1994, changed the maximum number of magistrates in Iredell County from 8 to 9, in Catawba County from 9 to 10 and in McDowell County from 4 to 5.

ARTICLE 14.

*District Judges.***§ 7A-140. Number; election; term; qualification; oath.**

CASE NOTES

Cited in *Republican Party v. Martin*,
980 F.2d 943 (4th Cir. 1992).

§ 7A-142. Vacancies in office.

A vacancy in the office of district judge shall be filled for the unexpired term by appointment of the Governor from nominations submitted by the bar of the judicial district as defined in G.S. 84-19. If the district court district is comprised of counties in more than one judicial district, the nominees shall be submitted jointly by the bars of those judicial districts, but only those members who reside in the district court district shall participate in the selection of the nominees. If the district court judge was elected as the nominee of a political party, then the district bar shall submit to the Governor the names of three persons who are residents of the district court district who are duly authorized to practice law in the district and who are members of the same political party as the vacating judge; provided that if there are not three persons who are available, the bar shall submit the names of two persons who meet the qualifications of this sentence. Within 60 days after the district bar submits nominations for a vacancy, the Governor shall appoint to fill the vacancy. If the Governor fails to appoint a district bar nominee within 60 days, then the district bar nominee who received the highest number of votes from the district bar shall fill the vacancy. If the district bar fails to submit nominations within 30 days from the date the vacancy occurs, the Governor may appoint to fill the vacancy without waiting for nominations. (1965, c. 310, s. 1; 1975, c. 441; 1981, c. 763, ss. 1, 2; 1985 (Reg. Sess., 1986), c. 1006, s. 1; 1987 (Reg. Sess., 1988), c. 1056, s. 7; c. 1086, s. 112(b); 1991, c. 742, s. 16.)

Effect of Amendments. —

The 1991 amendment, effective July 1, 1991, added the fifth sentence.

Legal Periodicals. — For note,

"*Baker v. Martin* and the Constitutionality of Partisan Qualifications for Appointment to District Courts," see 70 N.C.L. Rev. 1916 (1992).

CASE NOTES

Constitutionality. — This section, which provides that candidates for a vacancy in the office of a district judge shall be members of the same political party as the vacating judge, does not violate the Constitution of North Carolina. *Baker v. Martin*, 330 N.C. 331, 410 S.E.2d 887 (1991).

There is no constitutional impediment to the North Carolina General Assembly's decision to fill judicial vacancies only with nominees of the same political affiliation as the vacating judge. *Davis v. Martin*, 807 F. Supp. 385 (W.D.N.C. 1992).

Preference given in interim ap-

pointment permitted. — The General Assembly may require that in the interim appointment of a district court judge, preference must be given to a

member of the same political party as the vacating judge. *Baker v. Martin*, 330 N.C. 331, 410 S.E.2d 887 (1991).

§ 7A-144. Compensation.

(a) Each judge shall receive the annual salary provided in the Current Operations Appropriations Act, and reimbursement on the same basis as State employees generally, for his necessary travel and subsistence expenses.

(b) Notwithstanding merit, longevity and other increment raises paid to regular State employees, a judge of the district court shall receive as longevity pay an annual amount equal to four and eight-tenths percent (4.8%) of the annual salary set forth in the Current Operations Appropriations Act payable monthly after five years of service, nine and six-tenths percent (9.6%) after 10 years of service, fourteen and four-tenths percent (14.4%) after 15 years of service, and nineteen and two-tenths percent (19.2%) after 20 years of service. "Service" means service as a justice or judge of the General Court of Justice or as a member of the Utilities Commission or as director or assistant director of the Administrative Office of the Courts. Service shall also mean service as a district attorney or as a clerk of superior court. (1965, c. 310, s. 1; 1967, c. 691, s. 10; 1983, c. 761, s. 245; 1983 (Reg. Sess., 1984), c. 1034, s. 165; c. 1109, ss. 11, 13.1; 1985, c. 698, s. 10(a); 1987 (Reg. Sess., 1988), c. 1100, s. 15(d); 1989, c. 770, s. 5.)

Effect of Amendments. — Session Laws 1987 (Reg. Sess., 1988), c. 1100, s. 15(d), effective July 1, 1988, as amended by Session Laws 1989, c. 770, s. 5, effective August 12, 1989, inserted "or as di-

rector or assistant director of the Administrative Office of the Courts" at the end of the second sentence of subsection (b).

§ 7A-146. Administrative authority and duties of chief district judge.

The chief district judge, subject to the general supervision of the Chief Justice of the Supreme Court, has administrative supervision and authority over the operation of the district courts and magistrates in his district. These powers and duties include, but are not limited to, the following:

- (1) Arranging schedules and assigning district judges for sessions of district courts;
- (2) Arranging or supervising the calendaring of noncriminal matters for trial or hearing;
- (3) Supervising the clerk of superior court in the discharge of the clerical functions of the district court;
- (4) Assigning matters to magistrates, and consistent with the salaries set by the Administrative Officer of the Courts, prescribing times and places at which magistrates shall be available for the performance of their duties; however, the chief district judge may in writing delegate his authority to prescribe times and places at which magistrates in a particular county shall be available for the performance of their duties to another district court judge or the clerk of

the superior court, and the person to whom such authority is delegated shall make monthly reports to the chief district judge of the times and places actually served by each magistrate; and

- (5) Making arrangements with proper authorities for the drawing of civil court jury panels and determining which sessions of district court shall be jury sessions;
- (6) Arranging for the reporting of civil cases by court reporters or other authorized means;
- (7) Arranging sessions, to the extent practicable for the trial of specialized cases, including traffic, domestic relations, and other types of cases, and assigning district judges to preside over these sessions so as to permit maximum practicable specialization by individual judges;
- (8) Repealed by Session Laws 1991 (Regular Session, 1992), c. 900, s. 118(b), effective July 15, 1992.
- (9) Assigning magistrates during an emergency to temporary duty outside the county of their residence but within that district; and, upon the request of a chief district judge of an adjoining district and upon the approval of the Administrative Officer of the Courts, to temporary duty in the district of the requesting chief district judge; and
- (10) Designating another district judge of his district as acting chief district judge, to act during the absence or disability of the chief district judge. (1965, c. 310, s. 1; 1971, c. 377, s. 8; 1977, c. 945, s. 1; 1983, c. 586, s. 1; 1983 (Reg. Sess., 1984), c. 1034, s. 85; 1985, c. 425, s. 2; c. 764, s. 8; 1985 (Reg. Sess., 1986), c. 852, s. 17; 1991 (Reg. Sess., 1992), c. 900, s. 118(b).)

Editor's Note. —

Session Laws 1991 (Reg. Sess., 1992), c. 900, s. 2, provides: "This act shall be known as 'The Current Operations Appropriations Act of 1992.'"

Session Laws 1991 (Reg. Sess., 1992), c. 900, s. 182 is a severability clause.

Effect of Amendments. — The 1991 (Reg. Sess., 1992) amendment, effective July 15, 1992, repealed subdivision (8)

which read: "Promulgating the schedule of alcohol, traffic, hunting, fishing, and boating offenses adopted to pursuant to G.S. 7A-148(a) for which magistrates and clerks of court may accept written appearances, waivers of hearing or trial, and pleas of guilty and admissions of responsibility and establishing a schedule of fines or penalties therefor."

CASE NOTES

Cited in *Schumacher v. Schumacher*, 109 N.C. App. 309, 426 S.E.2d 467 (1993).

§ 7A-148. Annual conference of chief district judges.

(a) The chief district judges of the various district court districts shall meet at least once a year upon call of the Chief Justice of the Supreme Court to discuss mutual problems affecting the courts and the improvement of court operations, to prepare and adopt uniform schedules of offenses for the types of offenses specified in G.S. 7A-273(2) for which magistrates and clerks of court may accept written appearances, waivers of trial or hearing and pleas of guilty

or admissions of responsibility, and establish a schedule of penalties or fines therefor, and to take such further action as may be found practicable and desirable to promote the uniform administration of justice.

(b) The chief district judges shall prescribe a multicopy uniform traffic ticket and complaint for exclusive use in each county of the State not later than December 31, 1970. (1965, c. 310, s. 1; 1967, c. 691, s. 11; 1983, c. 586, s. 2; 1985, c. 425, s. 1; c. 764, s. 9; 1985 (Reg. Sess., 1986), c. 852, s. 17; 1991, c. 151, s. 1; c. 609, s. 2; 1991 (Reg. Sess., 1992), c. 900, s. 118(a).)

Editor's Note. —

Session Laws 1991 (Reg. Sess., 1992), c. 900, s. 2, provides: "This act shall be known as 'The Current Operations Appropriations Act of 1992.'"

Session Laws 1991 (Reg. Sess., 1992), c. 900, s. 182 is a severability clause.

Effect of Amendments. — Session Laws 1991, c. 151, s. 1, effective May 29, 1991, and applicable to all offenses committed on or after January 1, 1992, added "State park and recreation area rule offenses under Chapter 113," in the middle of subsection (a).

Session Laws 1991, c. 609, s. 2, effective October 1, 1991, and applicable to

violations that occur on or after that date, inserted "littering under G.S. 14-399(c)" in subsection (a).

The 1991 (Reg. Sess., 1992) amendment, effective July 15, 1992, substituted "uniform schedules of offenses for the types of offenses specified in G.S. 7A-273(2)" for "a uniform schedule of traffic offenses, littering under G.S. 14-399(c), hunting and fishing offenses under Chapter 113, State park and recreation area rule offenses under Chapter 113, boating offenses under Chapter 75A, and alcohol offenses under Chapter 18B" in subsection (a).

ARTICLE 16.

Magistrates.

§ 7A-171. (For effective date see note) Numbers; appointment and terms; vacancies.

Editor's Note. —

Session Laws 1993, c. 321, s. 200.4(h) provides that the magistrates' positions created by the amendment to § 7A-133 by c. 321, s. 200.4(e) for Person County in newly created District 9A shall be filled by the magistrates currently serving Person County in District 9 and that the magistrates' positions created by the amendment to § 7A-133 by c. 321, s. 200.4(e) for Caswell County in newly created District 9A shall be filled by the magistrates currently serving Caswell County in District 17A. Section 200.4(h) of c. 321 becomes effective November 1, 1993, or the date upon which subsections (e) and (f) of the section are approved under Section 5 of the Voting Rights Act of 1965, whichever is later. Preclearance was received from the U.S. Department of Justice by letter dated February 14, 1994.

Session Laws 1993, c. 321, s. 321 pro-

vides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 1993-95 biennium, the textual provisions of this act shall apply only to funds appropriated for and activities occurring during the 1993-95 biennium."

Session Laws 1993 (Reg. Sess., 1994), c. 769, s. 24 provided for the transfer of positions from the office of the Clerk of Superior Court of Forsyth County to the magistrate positions allocated to Forsyth County, and provided for the terms and salaries for those positions.

Session Laws 1993 (Reg. Sess., 1994), c. 769, s. 43.2 provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 1994-95 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 1994-95 fiscal year."

CASE NOTES

Appointing Judge Conducting Magistrate Removal Hearing. — Every Resident Regular Superior Court Judge who appoints a magistrate does not have, as a matter of law, a personal bias or prejudice which would disqualify

him under Code of Judicial Conduct, Canon 3 from conducting a magistrate's removal hearing pursuant to § 7A-173(c). In re Ezzell, 113 N.C. App. 388, 438 S.E.2d 482 (1994).

§ 7A-171.1. Duty hours, salary, and travel expenses within county.

(a) The Administrative Officer of the Courts, after consultation with the chief district judge and pursuant to the following provisions, shall set an annual salary for each magistrate.

- (1) A full-time magistrate shall be paid the annual salary indicated in the table set out in this subdivision. A full-time magistrate is a magistrate who is assigned to work an average of not less than 40 hours a week during the term of office. The Administrative Officer of the Courts shall designate whether a magistrate is full-time. Initial appointment shall be at the entry rate. A magistrate's salary shall increase to the next step every two years on the anniversary of the date the magistrate was originally appointed for increases to Steps 1 through 3, and every four years on the anniversary of the date the magistrate was originally appointed for increases to Steps 4 through 6.

Table of Salaries of Full-Time Magistrates

<i>Entry Rate</i>	<i>Annual Salary</i>
<i>Step 1</i>	\$22,958
<i>Step 2</i>	27,770
<i>Step 3</i>	30,506
<i>Step 4</i>	33,503
<i>Step 5</i>	36,797
<i>Step 6</i>	40,420.

- (2) A part-time magistrate is a magistrate who is assigned to work an average of less than 40 hours of work a week during the term, except that no magistrate shall be assigned an average of less than 10 hours of work a week during the term. A part-time magistrate is included, in accordance with G.S. 7A-170, under the provisions of G.S. 135-1(10) and G.S. 135-40.2(a). The Administrative Officer of the Courts designates whether a magistrate is a part-time magistrate. A part-time magistrate shall receive an annual salary based on the following formula: The average number of hours a week that a part-time magistrate is assigned work during the term shall be multiplied by the annual salary payable to a full-time magistrate who has the same number of years of service prior to the beginning of that term as does the part-time magistrate and the product of that multiplication shall be divided by the number 40. The quotient shall be the annual salary payable to that part-time magistrate.

- (3) Notwithstanding any other provision of this subsection, an individual who, when initially appointed as a full-time magistrate, is licensed to practice law in North Carolina, shall receive the annual salary provided in the Table in subdivision (1) of this subsection for Step 4. This magistrate's salary shall increase to the next step every four years on the anniversary of the date the magistrate was originally appointed. An individual who, when initially appointed as a part-time magistrate, is licensed to practice law in North Carolina, shall be paid an annual salary based on that for Step 4 and determined according to the formula in subdivision (2) of this subsection. This magistrate's salary shall increase to the next step every four years on the anniversary of the date the magistrate was originally appointed. The salary of a full-time magistrate who acquires a license to practice law in North Carolina while holding the office of magistrate and who at the time of acquiring the license is receiving a salary at a level lower than Step 4 shall be adjusted to Step 4 and, thereafter, shall advance in accordance with the Table's schedule. The salary of a part-time magistrate who acquires a license to practice law in North Carolina while holding the office of magistrate and who at the time of acquiring the license is receiving an annual salary as determined by subdivision (2) of this subsection based on a salary level lower than Step 4 shall be adjusted to a salary based on Step 4 in the Table and, thereafter, shall advance in accordance with the provision in subdivision (2) of this subsection.

(a1) **(Effective until June 30, 1999)** Notwithstanding subsection (a) of this section, the following salary provisions apply to individuals who were serving as magistrates on June 30, 1994:

- (1) The salaries of magistrates who on June 30, 1994, were paid at a salary level of less than five years of service under the table in effect that date shall be as follows:

Less than 1 year of service	\$18,095
1 or more but less than 3 years of service	19,205
3 or more but less than 5 years of service	20,896.

Upon completion of five years of service, those magistrates shall receive the salary set as the Entry Rate in the table in subsection (a).

- (2) The salaries of magistrates who on June 30, 1994, were paid at a salary level of five or more years of service shall be based on the rates set out in subsection (a) as follows:

<i>Salary Level on June 30, 1994</i>	<i>Salary Level on July 1, 1994</i>
<i>5 or more but less than 7 years of service</i>	<i>Entry Rate</i>
<i>7 or more but less than 9 years of service</i>	<i>Step 1</i>
<i>9 or more but less than 11 years of service</i>	<i>Step 2</i>
<i>11 or more years of service</i>	<i>Step 3.</i>

§ 7A-171.1(a1) has a delayed expiration date. See notes.

Thereafter, their salaries shall be set in accordance with the provisions in subsection (a).

- (3) The salaries of magistrates who are licensed to practice law in North Carolina shall be adjusted to the annual salary provided in the table in subsection (a) as Step 4, and, thereafter, their salaries shall be set in accordance with the provisions in subsection (a).

- (4) The salaries of "part-time magistrates" shall be set under the formula set out in subdivision (2) of subsection (a) but according to the rates set out in this subsection.

(a2) The Administrative Officer of the Courts shall provide magistrates with longevity pay at the same rates as are provided by the State to its employees subject to the State Personnel Act.

(b) Notwithstanding G.S. 138-6, a magistrate may not be reimbursed by the State for travel expenses incurred on official business within the county in which the magistrate resides. (1977, c. 945, s. 5; 1979, c. 838, s. 84; c. 991; 1979, 2nd Sess., c. 1137, s. 11; 1981, c. 914, s. 1; c. 1127, s. 11; 1983, c. 761, s. 199; c. 923, s. 217; 1983 (Reg. Sess., 1984), c. 1034, ss. 84, 211; 1985, c. 698, ss. 13(a), (14); 791, s. 39.1; 1985 (Reg. Sess., 1986), c. 1014, ss. 36, 223(a); 1987, c. 564, s. 12; c. 738, ss. 22, 34; 1987 (Reg. Sess., 1988), c. 1086, s. 16; 1989, c. 752, s. 33; 1991, c. 742, s. 14(a); 1991 (Reg. Sess., 1992), c. 900, ss. 41, 43; c. 1044, s. 9.1; 1993, c. 321, s. 60; 1993 (Reg. Sess., 1994), c. 769, s. 7.13(b), (c).)

Editor's Note. —

Session Laws 1991, c. 742, which amended this section, in s. 14(b) provides: "This section applies to all persons serving as magistrates on July 1, 1991, or appointed to serve on and after that date."

Session Laws 1991 (Reg. Sess., 1992), c. 900, s. 2, provides: "This act shall be known as 'The Current Operations Appropriations Act of 1992.'"

Session Laws 1991 (Reg. Sess., 1992), c. 900, s. 182 is a severability clause.

Session Laws 1993, c. 321, s. 322 is a severability clause.

Session Laws 1993 (Reg. Sess., 1994), c. 769, s. 2 provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 1994.'"

Session Laws 1993 (Reg. Sess., 1994), c. 769, s. 7.13(c) provides: "Subsection (a1) of G.S. 7A-171.1, as added by subsection (b) of this section, expires June 30, 1999."

Session Laws 1993 (Reg. Sess., 1994), c. 769, s. 7.13(d) provides: "Notwithstanding the provisions of G.S. 7A-171.1 or G.S. 7A-171.2, as rewritten by this act, any magistrate hired on or after July 1, 1994 and before the date of ratification of this act [July 16, 1994] shall be

treated as though they were employed on June 30, 1994, if the magistrate does not possess the educational and experience qualifications required by this section."

Session Laws 1993 (Reg. Sess., 1994), c. 769, s. 43.2 provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 1994-95 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 1994-95 fiscal year."

Session Laws 1993 (Reg. Sess., 1994), c. 769, s. 43.5 is a severability clause.

Effect of Amendments. —

The 1991 amendment, effective July 1, 1991, inserted "campus police officer, wildlife officer" in the first sentence of subdivision (a)(4). As to the applicability of this amendment, see the Editor's Note.

Session Laws 1991 (Reg. Sess., 1992), c. 900, s. 41, as amended by Session Laws 1991 (Reg. Sess., 1992), c. 1044, s. 9.1, and c. 900, s. 43, effective July 1, 1992, in subdivision (a)(1) deleted annual salary provisions for 1989 through 1991, and added the provisions for 1992 through 1993, and inserted the language beginning "or with 20 years' experience"

and ending "patrolman in the State of North Carolina" in the first sentence of subdivision (a)(4).

The 1993 amendment, effective July 1, 1993, in the Table of Salaries deleted "1992-93" under "Annual Salary", substituted "\$17,399" for "\$17,058", substituted "18,293" for "17,934", substituted

"20,092" for "19,698", substituted "22,075" for "21,642", substituted "24,290" for "23,814", substituted "26,702" for "26,178" and substituted "29,333" for "28,758".

The 1993 (Reg. Sess., 1994) amendment, effective July 1, 1994, rewrote this section.

§ 7A-171.2. Qualifications for nomination or re-nomination.

(a) In order to be eligible for nomination or for renomination as a magistrate an individual shall be a resident of the county for which he is appointed.

(b) To be eligible for nomination as a magistrate, an individual shall have a four-year degree from an accredited senior institution of higher education or shall have a two-year associate degree and four years of work experience in a related field, including teaching, social services, law enforcement, arbitration or mediation, the court system, or counseling. The Administrative Officer of the Courts may determine whether the work experience is sufficiently related to the duties of the office of magistrate for the purposes of this subsection. In determining whether an individual's work experience is in a related field, the Administrative Officer of the Courts shall consider the requisite knowledge, skills, and abilities for the office of magistrate.

The eligibility requirements prescribed by this subsection do not apply to individuals holding the office of magistrate on June 30, 1994, and do not apply to individuals who have been nominated by June 30, 1994, but who have not been appointed or taken the oath of office by that date.

(c) In order to be eligible for renomination as a magistrate an individual shall have successfully completed the course of basic training for magistrates prescribed by G.S. 7A-177.

(d) Notwithstanding any other provision of this subsection, an individual who holds the office of magistrate on July 1, 1977, shall not be required to have successfully completed the course of basic training for magistrates prescribed by G.S. 7A-177 in order to be eligible for renomination as a magistrate. (1977, c. 945, s. 6; 1993 (Reg. Sess., 1994), c. 769, s. 7.13(a).)

Editor's Note. — Session Laws 1993 (Reg. Sess., 1994), c. 769, s. 2 provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 1994.'"

Session Laws 1993 (Reg. Sess., 1994), c. 769, s. 43.2 provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 1994-95 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 1994-95 fiscal year."

Session Laws 1993 (Reg. Sess., 1994), c. 769, s. 7.13(d) provides: "Notwith-

standing the provisions of G.S. 7A-171.1 or G.S. 7A-171.2, as rewritten by this act, any magistrate hired on or after July 1, 1994 and before the date of ratification of this act [July 16, 1994] shall be treated as though they were employed on June 30, 1994, if the magistrate does not possess the educational and experience qualifications required by this section."

Session Laws 1993 (Reg. Sess., 1994), c. 769, s. 43.5 is a severability clause.

Effect of Amendments. — The 1993 (Reg. Sess., 1994) amendment, effective July 1, 1994, substituted "shall" for

"must" in subsections (a) and (c), and rewrote subsection (b).

§ 7A-173. Suspension; removal; reinstatement.

CASE NOTES

District Attorney's Participation in Proceedings. — Magistrate did not have standing to challenge involvement of the District Attorney in magistrate's removal proceeding as in violation of the constitutional limits on the District Attorney's office, where, had trial court the inherent authority to appoint an independent counsel, magistrate could not show that a different result would have occurred. In re Ezzell, 113 N.C. App. 388, 438 S.E.2d 482 (1994).

Judge Who Appoints Magistrate is Not Biased Per Se. — Every Resident Regular Superior Court Judge who appoints a magistrate does not have, as a matter of law, a personal bias or prejudice which would disqualify him under Code of Judicial Conduct, Canon 3 from conducting a magistrate's removal hearing pursuant to subsection (c). In re Ezzell, 113 N.C. App. 388, 438 S.E.2d 482 (1994).

ARTICLE 17.

Clerical Functions in the District Court.

§ 7A-180. Functions of clerk of superior court in district court matters.

The clerk of superior court:

- (1) Has and exercises all of the judicial powers and duties in respect of actions and proceedings pending from time to time in the district court of his county which are now or hereafter conferred or imposed upon him by law in respect of actions and proceedings pending in the superior court of his county;
- (2) Performs all of the clerical, administrative and fiscal functions required in the operation of the district court of his county in the same manner as he is required to perform such functions in the operation of the superior court of his county;
- (3) Maintains, under the supervision of the Administrative Office of the Courts, an office of uniform consolidated records of all judicial proceedings in the superior court division and the district court division of the General Court of Justice in his county. Those records shall include civil actions, special proceedings, estates, criminal actions, juvenile actions, minutes of the court and all other records required by law to be maintained. The form and procedure for filing, docketing, indexing, and recording shall be as prescribed by the Administrative Officer of the Courts notwithstanding any contrary statutory provision as to the title and form of the record or as a method of indexing;
- (4) Has the power to accept written appearances, waivers of trial or hearing and pleas of guilty or admissions of responsibility for the types of offenses specified in G.S. 7A-273(2) in accordance with the schedules of offenses promulgated

- by the Conference of Chief District Judges pursuant to G.S. 7A-148, and in such cases, to enter judgment and collect the fine or penalty and costs;
- (5) Has the power to issue warrants of arrest valid throughout the State, and search warrants valid throughout the county of the issuing clerk;
 - (6) Has the power to conduct an initial appearance in accordance with Chapter 15A, Article 24, Initial Appearance, and to fix conditions of release in accordance with Chapter 15A, Article 26, Bail;
 - (7) Continues to exercise all powers, duties and authority theretofore vested in or imposed upon clerks of superior court by general law, with the exception of jurisdiction in juvenile matters; and
 - (8) Has the power to accept written appearances, waivers of trial and pleas of guilty to violations of G.S. 14-107 when restitution, including service charges and processing fees allowed under G.S. 14-107, is made, the amount of the check is two thousand dollars (\$2,000) or less, and the warrant does not charge a fourth or subsequent violation of this statute, and, in such cases, to enter such judgments as the chief district judge shall direct and, forward the amounts collected as restitution to the appropriate prosecuting witnesses and to collect the costs.
 - (9) Repealed by Session Laws 1991 (Reg. Sess., 1992), c. 900, s. 118(c), effective July 15, 1992. (1965, c. 310, s. 1; 1967, c. 691, s. 16; 1969, c. 1190, s. 14; 1973, c. 503, ss. 3, 4; c. 1286, s. 6; 1975, c. 166, s. 23; c. 626, s. 2; 1981, c. 142; 1983, c. 586, s. 4; 1985, c. 425, s. 3; c. 764, s. 10; 1985 (Reg. Sess., 1986), c. 852, s. 17; 1987, c. 355, s. 3; 1989 (Reg. Sess., 1990), c. 1041, s. 2; 1991, c. 520, s. 1; 1991 (Reg. Sess., 1992), c. 900, s. 118(c); 1993, c. 374, s. 3.)

Editor's Note. —

Session Laws 1991 (Reg. Sess., 1992), c. 900, s. 2, provides: "This act shall be known as 'The Current Operations Appropriations Act of 1992.'"

Session Laws 1991 (Reg. Sess., 1992), c. 900, s. 182 is a severability clause.

Effect of Amendments. — The 1989 (Reg. Sess., 1990) amendment, effective July 27, 1990, added subdivision (9).

The 1991 amendment, effective October 1, 1991, and applicable to offenses committed on or after that date, substituted "two thousand dollars (\$2,000)" for "one thousand dollars (\$1,000)" in subdivision (8).

The 1991 (Reg. Sess., 1992) amendment, effective July 15, 1992, substituted "for the types of offenses specified in G.S. 7A-273(2) in accordance with the schedules" for "to certain alcohol, traffic,

hunting, fishing, and boating offenses in accordance with a schedule" in subdivision (4), deleted "and" at the end of subdivision (6), added "and" at the end of subdivision (7), and repealed subdivision (9) which read: "Has the power to accept written appearances, waivers of trial and pleas of guilty to violations of G.S. 14-399(c), and, in such cases, to enter judgments as the chief district court judge shall direct. No violation of G.S. 14-399 may be disposed of pursuant to this subdivision unless the criminal pleading specifically charges a violation of subsection (c) of G.S. 14-399."

The 1993 amendment, effective December 1, 1993, and applicable to checks written on or after that date, inserted "including service charges and processing fees allowed under G.S. 14-107" following "restitution" in subdivision (8).

CASE NOTES

The issuance of a search warrant is neither a district court matter nor a superior court matter, but pertains to pretrial investigation which need not — indeed, often cannot at that point — be classified according to the court where the defendant may eventually be tried. *State v. Pennington*, 327 N.C. 89, 393 S.E.2d 847 (1990).

Newly Created District Court Division Does Not Limit Superior Court

Clerk's Power to Issue Search Warrants. — In prescribing the organization and procedure of the newly created district court division, the General Assembly did not intend to limit the authority of superior court clerks to issue search warrants within their operative counties exclusively to criminal matters to be tried in district court. *State v. Pennington*, 327 N.C. 89, 393 S.E.2d 847 (1990).

§ 7A-181. Functions of assistant and deputy clerks of superior court in district court matters.

CASE NOTES

The issuance of a search warrant is neither a district court matter nor a superior court matter, but pertains to pretrial investigation which need not — indeed, often cannot at that point — be classified according to the court where the defendant may eventually be tried. *State v. Pennington*, 327 N.C. 89, 393 S.E.2d 847 (1990).

Newly Created District Court Division Does Not Limit Superior Court

Clerk's Power to Issue Search Warrants. — In prescribing the organization and procedure of the newly created district court division, the General Assembly did not intend to limit the authority of superior court clerks to issue search warrants within their operative counties exclusively to criminal matters to be tried in district court. *State v. Pennington*, 327 N.C. 89, 393 S.E.2d 847 (1990).

ARTICLE 18.

District Court Practice and Procedure Generally.

§ 7A-190. District courts always open.

CASE NOTES

Quoted in *Schumacher v. Schumacher*, 109 N.C. App. 309, 426 S.E.2d 467 (1993).

Cited in *WSOC Television, Inc. v. State ex rel. Att'y Gen.*, 107 N.C. App. 448, 420 S.E.2d 682 (1992).

§ 7A-191. Trials; hearings and orders in chambers.

CASE NOTES

Cited in *WSOC Television, Inc. v. State ex rel. Att'y Gen.*, 107 N.C. App. 448, 420 S.E.2d 682 (1992).

§ 7A-192. By whom power of district court to enter interlocutory orders exercised.

CASE NOTES

It was improper for a district judge to have held a trial on the merits of a divorce action at a civil motion session, and because the judge had no juris-

diction, the judgment was void. *Schumacher v. Schumacher*, 109 N.C. App. 309, 426 S.E.2d 467 (1993).

§ 7A-198. (For effective date see note) Reporting of civil trials.

Editor's Note. —

Session Laws 1993 c. 321, s. 200.4(j) provides: "Notwithstanding G.S. 7A-198, district court reporting services for newly created District 9A shall be provided by electronic recording equipment, freelance court reporters, or reports [sic] assigned from outside the District. The chief district court judge shall not appoint a court reporter to serve the District." Section 200.4(j) of c. 321 becomes effective November 1, 1993, or the date upon which subsections (e) and (f)

of the section are approved under Section 5 of the Voting Rights Act of 1965, whichever is later. Preclearance was received from the U.S. Department of Justice by letter dated February 14, 1994.

Session Laws 1993, c. 321, s. 321 provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 1993-95 biennium, the textual provisions of this act shall apply only to funds appropriated for and activities occurring during the 1993-95 biennium."

ARTICLE 19.

Small Claim Actions in District Court.

§ 7A-210. Small claim action defined.

For purposes of this Article a small claim action is a civil action wherein:

- (1) The amount in controversy, computed in accordance with G.S. 7A-243, does not exceed three thousand dollars (\$3,000); and
- (2) The only principal relief prayed is monetary, or the recovery of specific personal property, or summary ejectment, or any combination of the foregoing in properly joined claims; and
- (3) The plaintiff has requested assignment to a magistrate in the manner provided in this Article.

The seeking of the ancillary remedy of claim and delivery or an order from the clerk of superior court for the relinquishment of property subject to a lien pursuant to G.S. 44A-4(a) does not prevent an action otherwise qualifying as a small claim under this Article from so qualifying. (1965, c. 310, s. 1; 1973, c. 1267, s. 1; 1979, c. 144, s. 1; 1981, c. 555, s. 1; 1985, c. 329; c. 655, s. 1; 1989, c. 311, s. 1; 1993, c. 107, s. 1; c. 553, s. 73(a).)

Effect of Amendments. —

Session Laws 1993, c. 107, s. 2, as amended by Session Laws 1993, c. 553, s. 73, effective October 1, 1993, and ap-

plicable to claims filed on or after that date, in subdivision (1), substituted "three thousand dollars (\$3,000)" for "two thousand dollars".

CASE NOTES

Quoted in *Chrisalis Properties, Inc. v. Separate Quarters, Inc.*, 101 N.C. App. 81, 398 S.E.2d 628 (1990).

OPINIONS OF ATTORNEY GENERAL

Magistrate's Authority to Hear a Summary Ejectment Action. — A magistrate does not have the authority to hear a summary ejectment action involving residential rental property in another county if the landlord and the

tenant so provide in the lease. See opinion of Attorney General to Mr. James E. Lanning, Chief District Court Judge, 26th Judicial District, 60 N.C.A.G. 26 (1990).

§ 7A-211. Small claim actions assignable to magistrates.

OPINIONS OF ATTORNEY GENERAL

Magistrate's Authority to Hear a Summary Ejectment Action. — A magistrate does not have the authority to hear a summary ejectment action involving residential rental property in another county if the landlord and the

tenant so provide in the lease. See opinion of Attorney General to Mr. James E. Lanning, Chief District Court Judge, 26th Judicial District, — N.C.A.G. — May 1, 1990.

§ 7A-213. Procedure for commencement of action; request for and notice of assignment.

OPINIONS OF ATTORNEY GENERAL

Summary Ejectment Proceedings. — Because § 7-217(4) states that the procedure found in § 42-29 can be used in summary ejectment cases only, and because summary ejectment is in the nature of an in rem proceeding, an in personam money damages claim cannot be heard and a money judgment cannot be

entered in an action where service of process is effected through the alternative method under § 42-29. The requirements for actual service of process found elsewhere in this section and in § 1A-1, Rule 4 would still apply to the claim for rents and other money damages. — N.C.A.G. — (February 26, 1992).

§ 7A-217. Methods of subjecting person of defendant to jurisdiction.

OPINIONS OF ATTORNEY GENERAL

Summary Ejectment Proceedings. — Because subdivision (4) of this section

states that the procedure found in § 42-29 can be used in summary eject-

ment cases only, and because summary ejectment is in the nature of an in rem proceeding, an in personam money damages claim cannot be heard and a money judgment cannot be entered in an action where service of process is effected through the alternative method under § 42-29. The requirements for actual

service of process found elsewhere in G.S. § 7A-213 and in § 1A-1, Rule 4 would still apply to the claim for rents and other money damages. See opinion of Attorney General to Hon. Thomas N. Hix, Chief District Court Judge, 29th Judicial Circuit, 60 N.C.A.G. 95 (1992).

§ 7A-219. Certain counterclaims; cross claims; third-party claims not permissible.

No counterclaim, cross claim or third-party claim which would make the amount in controversy exceed the jurisdictional amount established by G.S. 7A-210(1) is permissible in a small claim action assigned to a magistrate. No determination of fact or law in an assigned small claim action estops a party thereto in any subsequent action which, except for this section, might have been asserted under the Code of Civil Procedure as a counterclaim in the small claim action. (1965, c. 310, s. 1; 1973, c. 1267, s. 2; 1979, c. 144, s. 2; 1981, c. 555, s. 2; 1985, c. 329; 1989, c. 311, s. 2; 1993, c. 553, s. 73(b).)

Editor's Note. — Session Laws 1993, c. 553, which amended this section, in s. 73(e) provides that s. 73(b) through (d) become effective at the same time as Session Laws 1993, c. 107 becomes effective. That act became effective on October 1, 1993.

Effect of Amendments. —

The 1993 amendment, effective October 1, 1993, substituted "the jurisdictional amount established by G.S. 7A-210(1)" for "two thousand dollars (\$2,000)".

§ 7A-228. New trial before magistrate; appeal for trial de novo; how appeal perfected; oral notice; dismissal.

(a) With the consent of the chief district court judge, a magistrate may set aside an order or judgment for mistake or excusable neglect pursuant to G.S. 1A-1, Rule 60(b)(1) and order a new trial before a magistrate. After final disposition before the magistrate, the sole remedy for an aggrieved party is appeal for trial de novo before a district court judge or a jury. Notice of appeal may be given orally in open court upon announcement or after entry of judgment. If not announced in open court, written notice of appeal must be filed in the office of the clerk of superior court within 10 days after entry of judgment. The appeal must be perfected in the manner set out in subsection (b). Upon announcement of the appeal in open court or upon receipt of the written notice of appeal, the appeal shall be noted upon the judgment. If the judgment was mailed to the parties, then the time computations for appeal of such judgment shall be pursuant to G.S. 1A-1, Rule 6.

(b) The appeal shall be perfected by (1) oral announcement of appeal in open court; or (2) by filing notice of appeal in the office of the clerk of superior court within 10 days after entry of judgment, pursuant to subsection (a), and by serving a copy of the notice of

appeal on all parties pursuant to G.S. 1A-1, Rule 5. Failure to pay the costs of court to appeal within 20 days after entry of judgment shall result in the automatic dismissal of the appeal. The failure to demand a trial by jury in district court by the appealing party before the time to perfect the appeal has expired is a waiver of the right thereto.

(b1) A person desiring to appeal as an indigent shall, within 10 days of entry of judgment by the magistrate, file an affidavit that he or she is unable by reason of poverty to pay the costs of appeal. Within 20 days after entry of judgment, a superior or district court judge, magistrate, or the clerk of the superior court may authorize a person to appeal to district court as an indigent if the person is unable to pay the costs of appeal. The clerk of superior court shall authorize a person to appeal as an indigent if the person files the required affidavit and meets one or more of the criteria listed in G.S. 1-110. A superior or district court judge, a magistrate, or the clerk of the superior court may authorize a person who does not meet any of the criteria listed in G.S. 1-110 to appeal as an indigent if the person cannot pay the costs of appeal.

The district court may dismiss an appeal and require the person filing the appeal to pay the court costs advanced if the allegations contained in the affidavit are determined to be untrue or if the court is satisfied that the action is frivolous or malicious. If the court dismisses the appeal, the court shall affirm the judgment of the magistrate.

(c) Whenever such appeal is docketed and is regularly set for trial, and the appellant fails to appear and prosecute his appeal, the presiding judge may have the appellant called and the appeal dismissed; and in such case the judgment of the magistrate shall be affirmed. (1965, c. 310, s. 1; 1969, c. 1190, s. 22; 1979, 2nd Sess., c. 1328, s. 3; 1981, c. 599, s. 3; 1985, c. 753, ss. 1, 2; 1987, c. 553; 1993, c. 435, s. 2.)

Effect of Amendments. — The 1993 amendment, effective October 1, 1993, and applicable to all suits or appeals prosecuted on or after that date, in the first sentence of subsection (b1) substituted “an indigent” for “a pauper”, inserted “or she” and deleted from the end “and proves, by one or more witnesses,

that he has a meritorious cause of action or defense”; in the second sentence of subsection (b1) substituted “an indigent if the person is unable to pay the costs of appeal” for “a pauper”; added the last two sentences of subsection (b1); and added the last paragraph of subsection (b1).

CASE NOTES

Collection of Costs. — Although in *Porter v. Cahill*, 1 N.C. App. 579, 581, 162 S.E.2d 128, 130 (1968) the court held it is the duty of the clerk of superior court to collect the costs of appeal, that case was decided before the effective date of the amendment to this section requiring the payment of the costs of appeal to perfect the appeal. *Principal Mut. Life Ins. Co. v. Burnup & Sims*,

114 N.C. App. 494, 442 S.E.2d 85 (1994).

Duty to Pay. — Plaintiff has the responsibility of ascertaining and paying the costs of appeal. *Principal Mut. Life Ins. Co. v. Burnup & Sims, Inc.*, 114 N.C. App. 494, 442 S.E.2d 85 (1994).

Quoted in *Windley v. Dockery*, 95 N.C. App. 771, 383 S.E.2d 682 (1989).

SUBCHAPTER V. JURISDICTION AND POWERS OF THE TRIAL DIVISIONS OF THE GENERAL COURT OF JUSTICE.

ARTICLE 20.

Original Civil Jurisdiction of the Trial Divisions.

§ 7A-240. Original civil jurisdiction generally.

CASE NOTES

Jurisdiction Over All Justiciable Matters, etc. —

Unless jurisdiction is specifically placed elsewhere, both the superior court division and the district court division have subject matter jurisdiction over all “justiciable” civil claims. *State ex rel. Thornburg v. Lot & Bldgs.* at 800 Waughtown St., 107 N.C. App. 559, 421 S.E.2d 374, cert. denied, 333 N.C. 170, 424 S.E.2d 915 (1992).

Claims Clearly Justiciable Matters. — Where executor of decedent’s estate filed its petition for hearing requesting instructions from the clerk of superior court as to whether surviving spouse was entitled to participate in the administration, settlement and distribution of decedent’s estate, the claims at issue were claims of misrepresentation, undue influence and inadequate disclosure of assets or liabilities, clearly justiciable matters of a civil nature, original general jurisdiction over which is vested in the trial division; the superior court judge properly found that the clerk lacked jurisdiction in this matter and properly voided the clerk’s order. *In re Estate of Wright*, 114 N.C. App. 659, 442 S.E.2d 540 (1994).

Superior Court Jurisdiction in

Summary Ejectment Actions. —

When the legislature created the district court division and gave it concurrent original jurisdiction over all matters except probate and matters of decedents’ estates, it did not thereby divest the superior court division of any of its original jurisdiction; hence, the superior court division has original jurisdiction over summary ejectment actions. *East Carolina Farm Credit v. Salter*, 113 N.C. App. 394, 439 S.E.2d 610 (1994).

Civil Forfeiture. — Where the civil forfeiture dispute at the trial level was a “justiciable” matter, the superior court’s determination that it had subject matter jurisdiction was proper. *State ex rel. Thornburg v. Lot & Bldgs.* at 800 Waughtown St., 107 N.C. App. 559, 421 S.E.2d 374, cert. denied, 333 N.C. 170, 424 S.E.2d 915 (1992).

Applied in *Church v. Carter*, 94 N.C. App. 286, 380 S.E.2d 167 (1989); *Schall v. Jennings*, 99 N.C. App. 343, 393 S.E.2d 130 (1990); *Bynum v. Frederickson Motor Express Corp.*, 112 N.C. App. 125, 434 S.E.2d 241 (1993).

Cited in *Foy v. Hunter*, 106 N.C. App. 614, 418 S.E.2d 299 (1992); *Republican Party v. Martin*, 980 F.2d 943 (4th Cir. 1992).

§ 7A-241. Original jurisdiction in probate and administration of decedents’ estates.

CASE NOTES

Cited in *In re Estate of Tucci*, 94 N.C. App. 428, 380 S.E.2d 782 (1989).

§ 7A-243. Proper division for trial of civil actions generally determined by amount in controversy.

CASE NOTES

Applied in *Schall v. Jennings*, 99 N.C. App. 343, 393 S.E.2d 130 (1990).

Cited in *Foy v. Hunter*, 106 N.C. App. 614, 418 S.E.2d 299 (1992).

§ 7A-244. Domestic relations.

CASE NOTES

Waiver of Venue in Custody and Support Modification Action. — Waiver of venue occurs when a custody and support modification request is filed with the district court in an improper county and there is no timely demand that the trial be conducted in the proper

county. In such event, the district court in the improper county appropriately adjudicates the modification request. *Brooks v. Brooks*, 107 N.C. App. 44, 418 S.E.2d 534 (1992).

Applied in *Schall v. Jennings*, 99 N.C. App. 343, 393 S.E.2d 130 (1990).

§ 7A-245. Injunctive and declaratory relief to enforce or invalidate statutes; constitutional rights.

CASE NOTES

Exhaustion of Administrative Remedies Not Required. — There is no requirement that the agency must exhaust any administrative remedies before seeking the court's help in enforcing an administrative rule adopted by that agency or in seeking a declaration that contracts adopted in violation of the

agency's rule are contrary to public policy or the constitution. *State v. Whittle Communications*, 328 N.C. 456, 402 S.E.2d 556 (1991).

Applied in *State v. Whittle Communications*, 328 N.C. 456, 402 S.E.2d 556 (1991).

§ 7A-249. Corporate receiverships.

The superior court division is the proper division, without regard to the amount in controversy, for actions for corporate receiverships under Chapter 1, Article 38, of the General Statutes, and proceedings under Chapters 55 (North Carolina Business Corporation Act) and 55A (Nonprofit Corporation Act) of the General Statutes. (1965, c. 310, s. 1; 1973, c. 503, s. 6; 1989 (Reg. Sess., 1990), c. 1024, s. 3.)

Effect of Amendments. — The 1989 (Reg. Sess., 1990) amendment, effective July 1, 1990, substituted "North Caro-

lina Business Corporation Act" for "Business Corporation Act."

§ 7A-250. Review of decisions of administrative agencies.

CASE NOTES

Quoted in *Harding v. North Carolina Dep't of Cor.*, 334 N.C. 414, 432 S.E.2d 298 (1993).

Cited in *North Carolina DOT v. Dayenport*, 334 N.C. 428, 432 S.E.2d 303 (1993).

§ 7A-251. Appeal from clerk to judge.

CASE NOTES

Cited in *In re Estate of Tucci*, 104 N.C. App. 142, 408 S.E.2d 859 (1991).

ARTICLE 21.

Institution, Docketing, and Transferring Civil Causes in the Trial Divisions.

§ 7A-258. Motion to transfer.

CASE NOTES

There is no such thing as an oral motion to transfer. *East Carolina Farm Credit v. Salter*, 113 N.C. App. 394, 439 S.E.2d 610 (1994).

Cited in *Foy v. Hunter*, 106 N.C. App. 614, 418 S.E.2d 299 (1992).

ARTICLE 22.

Jurisdiction of the Trial Divisions in Criminal Actions.

§ 7A-270. Generally.

CASE NOTES

Cited in *United States v. Alston*, 717 F. Supp. 378 (M.D.N.C. 1989); *Republi-*

can Party v. Martin, 980 F.2d 943 (4th Cir. 1992).

§ 7A-271. Jurisdiction of superior court.

CASE NOTES

- I. General Consideration.
- II. Jurisdiction over Misdemeanors.
 - A. In General.
 - B. Charge Initiated by Presentment.

I. GENERAL CONSIDERATION.

Quoted in *State v. Birdsong*, 325 N.C. 418, 384 S.E.2d 5 (1989).

Cited in *State v. Clemmons*, 100 N.C. App. 286, 396 S.E.2d 616 (1990); *State v. Grumbles*, 104 N.C. App. 766, 411 S.E.2d 407 (1991); *State ex rel. Thornburg v. Lot & Bldgs. at 800 Waughtown St.*, 107 N.C. App. 559, 421 S.E.2d 374 (1992); *State v. Sullivan*, 110 N.C. App. 779, 431 S.E.2d 502 (1993); *State v. Petersilie*, 334 N.C. 169, 432 S.E.2d 832 (1993).

II. JURISDICTION OVER MISDEMEANORS.**A. In General.****Jurisdiction of Superior Court over Misdemeanors. —**

In accord with third paragraph in the main volume. See *State v. Martin*, 97 N.C. App. 19, 387 S.E.2d 211 (1990).

The Superior Courts of North Carolina have exclusive original jurisdiction over all criminal actions not assigned to the district court division except that the superior courts have jurisdiction to try a misdemeanor offense where (1) it is a lesser included offense of a felony properly before the court by indictment or information, (2) the charge is initiated by presentment, (3) the misdemeanor is properly consolidated for trial with a felony, (4) a plea of guilty or nolo contendere is tendered in lieu of a felony charge, or (5) a misdemeanor conviction is appealed for trial de novo, to accept a guilty plea to a lesser included or related charge. *State v. Petersilie*, 105 N.C. App. 233, 414 S.E.2d 41 (1992), rev'd on other grounds, 334 N.C. 169, 432 S.E.2d 832 (1993).

Derivative Jurisdiction. —

In accord with second paragraph in

the main volume. See *State v. Martin*, 97 N.C. App. 19, 387 S.E.2d 211 (1990).

B. Charge Initiated by Presentment.

"Initiated" Construed. — The term "initiated" refers to how the criminal process in superior court began, not to what the first criminal process of any kind in any court was. *State v. Gunter*, 111 N.C. App. 621, 433 S.E.2d 191, appeal dismissed, 335 N.C. 561, 439 S.E.2d 154 (1993).

Initiation Not Shown. —

The superior court had neither exclusive original jurisdiction of the misdemeanors under subdivisions (a)(1)-(5) of this section, nor derivative jurisdiction under subsection (b) where the record indicated that defendant's arrest sprang from indictments issued by the grand jury which originated in the superior court, and there was no indication in the record that a presentment preceded the indictments. *State v. Petersilie*, 105 N.C. App. 233, 414 S.E.2d 41 (1992), rev'd on other grounds, 334 N.C. 169, 432 S.E.2d 832 (1993).

Jurisdiction in Superior Court Shown. — This section grants jurisdiction to the superior court in any action already properly pending in the district court if the grand jury issues a presentment and that presentment is the first accusation of the offense within superior court. Therefore, defendant's driving while impaired (DWI) action was properly under the jurisdiction of the district court and not the superior court when the citation was issued, but as soon as the grand jury issued the presentment, the superior court acquired jurisdiction. *State v. Gunter*, 111 N.C. App. 621, 433 S.E.2d 191, appeal dismissed, 335 N.C. 561, 439 S.E.2d 154 (1993).

§ 7A-272. Jurisdiction of district court.**CASE NOTES**

- I. General Consideration.
- II. Jurisdiction over Misdemeanors.

I. GENERAL CONSIDERATION.

Applied in *State v. Petersilie*, 334 N.C. 169, 432 S.E.2d 832 (1993).

Cited in *State v. Birdsong*, 325 N.C. 418, 384 S.E.2d 5 (1989); *United States v. Alston*, 717 F. Supp. 378 (M.D.N.C.

1989); *State ex rel. Thornburg v. Lot & Bldgs. at 800 Waughtown St.*, 107 N.C. App. 559, 421 S.E.2d 374 (1992).

II. JURISDICTION OVER MISDEMEANORS.**Derivative Jurisdiction of Supe-**

rior Court over Misdemeanors. — The jurisdiction of the superior court over a misdemeanor, unless a circumstance enumerated in § 7A-271(a) arises, is a derivative and arises only upon appeal from a conviction of the misdemeanor in district court. *State v. Martin*, 97 N.C. App. 19, 387 S.E.2d 211 (1990).

Generally, the superior court has no jurisdiction to try a defendant on a misdemeanor charge unless he was first tried, convicted and sentenced in district court and then appeals the judgment for a trial de novo in superior court. *State v. Martin*, 97 N.C. App. 19, 387 S.E.2d 211 (1990).

Driving Under the Influence. — This section grants jurisdiction to the superior court in any action already properly pending in the district court if the grand jury issues a presentment and that presentment is the first accusation of the offense within superior court. Therefore, defendant's driving while impaired (DWI) action was properly under the jurisdiction of the district court and not the superior court when the citation was issued, but as soon as the grand jury issued the presentment, the superior court acquired jurisdiction. *State v. Gunter*, 111 N.C. App. 621, 433 S.E.2d 191, appeal dismissed, 335 N.C. 561, 439 S.E.2d 154 (1993).

§ 7A-273. (See editor's note for date change) Powers of magistrates in infractions or criminal actions.

In criminal actions or infractions, any magistrate has power:

- (1) **(Effective October 1, 1994 — See editor's note)** In infraction cases in which the maximum penalty that can be imposed is not more than fifty dollars (\$50.00), exclusive of costs, or in Class 3 misdemeanors, other than the types of infractions and misdemeanors specified in subdivision (2) of this section, to accept guilty pleas or admissions of responsibility and enter judgment;
- (2) In misdemeanor or infraction cases involving alcohol offenses under Chapter 18B of the General Statutes, traffic offenses, hunting, fishing, State park and recreation area rule offenses under Chapter 113 of the General Statutes, boating offenses under Chapter 75A of the General Statutes, and littering offenses under G.S. 14-399(c), to accept written appearances, waivers of trial or hearing and pleas of guilty or admissions of responsibility, in accordance with the schedule of offenses and fines or penalties promulgated by the Conference of Chief District Judges pursuant to G.S. 7A-148, and in such cases, to enter judgment and collect the fines or penalties and costs;
- (3) To issue arrest warrants valid throughout the State;
- (4) To issue search warrants valid throughout the county;
- (5) To grant bail before trial for any noncapital offense;
- (6) Notwithstanding the provisions of subdivision (1) of this section, to hear and enter judgment as the chief district judge shall direct in all worthless check cases brought under G.S. 14-107, when the amount of the check is two thousand dollars (\$2,000) or less. Provided, however, that under this section magistrates may not impose a prison sentence longer than 30 days;
- (7) To conduct an initial appearance as provided in G.S. 15A-511; and
- (8) To accept written appearances, waivers of trial and pleas of guilty in violations of G.S. 14-107 when the amount of the

check is two thousand dollars (\$2,000) or less, restitution, including service charges and processing fees allowed by G.S. 14-107, is made, and the warrant does not charge a fourth or subsequent violation of this statute, and in these cases to enter judgments as the chief district judge directs.

- (9) Repealed by Session Laws 1991 (Regular Session, 1992), c. 900, s. 118(d), effective July 15, 1992. (1965, c. 310, s. 1; 1969, c. 876, s. 2; c. 1190, s. 25; 1973, c. 6; c. 503, s. 8; c. 1286, s. 7; 1975, c. 626, s. 4; 1977, c. 873, s. 1; 1979, c. 144, s. 3; 1981, c. 555, s. 3; 1983, c. 586, s. 5; 1985, c. 425, s. 4; c. 764, s. 16; 1985 (Reg. Sess., 1986), c. 852, s. 17; 1987, c. 355, ss. 1, 2; 1989, c. 343; c. 763; 1989 (Reg. Sess., 1990), c. 1041, s. 1; 1991, c. 520, s. 2; 1991 (Reg. Sess., 1992), c. 900, s. 118(d); 1993, c. 374, s. 4; c. 538, s. 35; 1994, Ex. Sess., c. 14, s. 1; c. 24, s. 14(b).)

Editor's Note. —

Session Laws 1991 (Reg. Sess., 1992), c. 900, s. 2, provides: "This act shall be known as 'The Current Operations Appropriations Act of 1992.'"

Session Laws 1991 (Reg. Sess., 1992), c. 900, s. 182 is a severability clause.

Session Laws 1993, c. 538, which amended this section, in s. 56, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(b), provides: "This act becomes effective October 1, 1994, and applies only to offenses occurring on or after that date. Prosecutions for, or sentences based on, offenses occurring before the effective date of this act are not abated or affected by the repeal or amendment in this act of any statute, and the statutes that would be applicable to those prosecutions or sentences but for the provisions of this act remain applicable to those prosecutions or sentences."

Session Laws 1994, Extra Session, c. 14, s. 73 provides: "Prosecutions for offenses committed before the effective date of this act [October 1, 1994] are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Effect of Amendments. —

The 1989 (Reg. Sess., 1990) amendment, effective July 27, 1990, in subdivision (9), inserted "(c)" following "G.S. 14-399," and added the second sentence of the subdivision.

The 1991 amendment, effective October 1, 1991, and applicable to offenses committed on or after that date, substituted "two thousand dollars (\$2,000)" for "one thousand dollars (\$1,000)" in subdivision (6), and subdivision (8).

The 1991 (Reg. Sess., 1992) amend-

ment, effective July 15, 1992, substituted "the types of offenses specified in subdivision (2) of this section" for "traffic, hunting, fishing, boating, and alcohol offenses" in subdivision (1), substituted the language beginning "alcohol offenses" and ending "offenses under G.S. 14-399(c)" for "alcohol, traffic, hunting, fishing, and boating offenses" in subdivision (2), deleted "and" at the end of subdivision (4), added "and" at the end of subdivision (7), and repealed subdivision (9) which read: "Notwithstanding the provisions of subdivision (1) of this section, to accept written appearances, waivers of trial and pleas of guilty in violations of G.S. 14-399(c) and enter judgments in those cases as the chief district judge directs. No violation of G.S. 14-399 may be disposed of pursuant to this subdivision unless the criminal pleading specifically charges a violation of subsection (c) of G.S. 14-399."

Session Laws 1993, c. 374, s. 4, effective December 1, 1993, and applicable to checks written on or after that date, inserted "including service charges and processing fees allowed by G.S. 14-107" following "restitution" in subdivision (8).

Session Laws 1993, c. 538, s. 35, effective October 1, 1994, substituted "infraction cases, in which the maximum penalty that can be imposed is not more than fifty dollars (\$50.00), exclusive of costs, or in Class 3 misdemeanors" for "misdemeanor or infraction cases" near the beginning of subdivision (1), and deleted "in which the maximum punishment which can be adjudged cannot exceed imprisonment for 30 days, or a fine of fifty dollars (\$50.00) or a penalty of not more than fifty dollars (\$50.00), ex-

clusive of costs" following "subdivision (2) of this section" in subdivision (1).

The 1994 Extra Session amendment, by c. 14, s. 1, effective on the same date that Chapter 539 of the 1993 Session Laws becomes effective (October 1, 1994), and applicable to offenses occur-

ring on or after that date, in subdivision (1) deleted a comma preceding "cases," inserted a comma following "Class 3 misdemeanors," and substituted "infractions and misdemeanors" for "offenses" following "types of."

ARTICLE 24.

Juvenile Services.

§ 7A-289.1. Purpose.

CASE NOTES

Cited in *In re Bluebird*, 105 N.C. App. 42, 411 S.E.2d 820 (1992).

§ 7A-289.5. (For effective date see note) Duties and powers of chief court counselors.

Editor's Note. — Session Laws 1993, c. 321, s. 200.4(i) provides: "Juvenile intake, probation, and aftercare services for newly created District 9A shall be provided by the chief court counselor's office in District 17A. One such position serving the chief court counselor's office in current District 9 shall be transferred to District 17A to facilitate the provision of juvenile intake, probation, and aftercare services to newly created District 9A." Section 200.4(i) of c. 321 becomes effective November 1, 1993, or the date upon which subsections (e) and (f) of the

section are approved under Section 5 of the Voting Rights Act of 1965, whichever is later. Preclearance was received from the U.S. Department of Justice by letter dated February 14, 1994.

Session Laws 1993, c. 321, s. 321 provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 1993-95 biennium, the textual provisions of this act shall apply only to funds appropriated for and activities occurring during the 1993-95 biennium."

ARTICLE 24A.

Delinquency Prevention and Youth Services.

§ 7A-289.13. Legislative intent.

The General Assembly hereby declares its intent to reduce the number of children committed by the courts for delinquency to institutions operated by the Division of Youth Services, Department of Human Resources or other State agencies. The primary intent of this Article is to provide a comprehensive plan for the development of community-based alternatives to training school commitment so that "status offenders" (defined by this Article to include "those juveniles guilty of offenses which would not be violations of the law if committed by an adult") may be eliminated from the youth development institutions of this State. Additionally it is the intent of this legislation to provide noninstitutional disposition options in any case before the juvenile court where this disposition is considered in the best interest of the child and the community.

The policy and intent of the General Assembly in delinquency prevention and community-based services can be summarized as follows:

- (1) These programs shall be planned and organized at the community level within the State, and these planning efforts shall include appropriate representation from local government, local public and private agencies serving families and children, local business leaders, citizens with an interest in youth problems, youth representatives, and others as may be appropriate in a particular community. The role of the State shall be to provide technical assistance, access to funding, and program information, and to assist local leadership in appropriate planning.
- (1a) As a prerequisite for receiving funding for Community-Based Alternatives, each county shall appoint a Community-Based Alternatives Youth Services Advisory Committee and shall update and revise the Committee's membership to ensure appropriate representation. As vacancies occur on Community-Based Alternatives Youth Services Advisory Committees or as new committees are appointed. The committee members shall be reflective of the racial and socioeconomic diversity of the community.
- (1b) The Community-Based Alternatives Youth Services Advisory Committee required by subdivision (1a) of this section shall annually review the needs of troubled juveniles within its county, develop and advertise a Request for Proposal process, and submit a written Plan of Action for the expenditure of Community-Based Alternatives funds to the county for its approval. Upon the county's authorization, the Plan shall be submitted to the Department of Human Resources for final approval and subsequent implementation.
- (1c) The Division of Youth Services shall develop and implement uniform standards for each county's Community-Based Alternative Youth Services Advisory Committee's annual certification and written requirements for program planning including a standard format for the Request for Proposal.
- (2) When a child is adjudicated to be within the juvenile jurisdiction of the district court, this child should be carefully evaluated through the available community-level resources, including mental health, social services, public health and other available medical services, public schools, and other appropriate services, prior to the juvenile hearing dealing with disposition so that the disposition of the court may be made with an understanding of the needs of the child and after consideration of the resources available to meet these needs.
- (3) It is contrary to the policy of the State for a court to separate a child from the child's own family or commit a child to an institution or training school without a careful evaluation of the needs of the child.
- (4) The General Assembly finds that State and local government shall be responsive to the need for community-based services that would provide a viable alternative to commitment to an institution or training school. The General As-

sembly intends that State government should be responsive to this need through the Department of Human Resources by helping public and private local groups to plan, develop, and fund community-based programs, both residential and nonresidential. The General Assembly recognizes that these efforts will require the cooperation of several major State departments in addition to Human Resources, such as the Department of Public Instruction, the Administrative Office of the Courts, and the Governor's Crime Commission of the Department of Crime Control and Public Safety.

- (5) It is the intent of the General Assembly that the Secretary of the Department of Human Resources develop a funding mechanism that will provide State support for programs that meet the standards as developed under the provisions of this Article.

The Secretary of the Department of Human Resources shall adopt rules to implement this section. (1975, c. 929; 1977, c. 627, ss. 18, 19; 1994, Ex. Sess., c. 24, s. 35(a).)

Editor's Note. — Subdivision (1a) is set out above just as it appears in Session Laws 1994, Extra Session, c. 24, s. 35(a).

Session Laws 1994, Extra Session, c. 24, which amended this section, in s. 3 provides: "This act shall be known as the Crime Control and Prevention Act of 1994."

Session Laws 1994, Extra Session, c. 24, s. 35(b) and (c) provides: "(b) Of the funds appropriated to the Department of Human Resources, Division of Youth Services, in this act the sum of five million dollars (\$5,000,000) for the 1994-95 fiscal year shall be used to expand Community-Based Alternatives services. Of these funds, four million dollars (\$4,000,000) shall be allocated per capita among the counties, based on the number of children in the county between the ages of 10 and 17, and one million dollars (\$1,000,000) shall be allocated evenly among all counties.

"The Community-Based Alternatives Youth Services Advisory Committee shall annually review the needs of troubled youth and submit a written Plan of Action to the county board of commissioners for approval, in accordance with G.S. 7A-289.13(1b). In those counties that have a commitment rate above one person per thousand, the plan shall describe how these additional funds will be used to reduce the county commitment rate. In those counties that have a commitment rate at or less than one per thousand, the plan shall specify how the funds will be used to maintain or reduce the commitment rate. The plan shall

provide for the county to use funds appropriated in this section to purchase care or services from local public agencies and private nonprofit 501(c)(3) corporations and housing authorities providing delinquency prevention programs or community-based services. The plan shall emphasize the provision of services for children against whom a complaint of delinquency has been made, regardless of whether the juvenile was diverted to a community resource or adjudicated delinquent. The approved plan shall then be submitted to the Division of Youth Services for approval.

"(c) These funds shall be matched by each county as currently required by the Division of Youth Services."

Session Laws 1994, Extra Session, c. 24, s. 70, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 1993-95 biennium, the textual provisions of this act shall apply only to funds appropriated for and activities occurring during the 1993-95 biennium."

Session Laws 1994, Extra Session, c. 24, s. 71 is a severability clause.

Effect of Amendments. — The 1994 Extra Session amendment, effective March 26, 1994, in the first sentence of the first paragraph substituted "Youth Services" for "Youth Development" and in the last sentence of the first paragraph substituted "considered" for "deemed to be"; in subdivision (1) substituted "local public and private agencies serving families and children" for "local agencies serving families and children (both public and private)"; added subdi-

visions (1a), (1b), and (1c); in subdivision (2) deleted parentheses and substituted "other appropriate services" for "others as appropriate"; made subsection (3) gender neutral; in subdivision (4) in the last sentence substituted "The General

Assembly recognizes" for "It is recognized" and added "of the Department of Crime Control and Public Safety" at the end; added the last sentence; and made stylistic changes throughout the section.

ARTICLE 24B.

Termination of Parental Rights.

§ 7A-289.22. Legislative intent; construction of Article.

Legal Periodicals. —

For article, "The Parental Rights of Unwed Fathers: A Developmental Per-

spective," see 20 N.C. Cent. L.J. 45 (1992).

CASE NOTES

The exclusive judicial procedure to be used in termination of parental rights cases is prescribed by the legislature in this section. *Curtis v. Curtis*, 104 N.C. App. 625, 410 S.E.2d 917 (1991).

Summary Proceeding Not Allowed. — Article 24 of Chapter 7A does not provide for a summary proceeding to determine whether the petitioner has proven the existence of one or more of the grounds for termination. Thus, the trial court erred in granting petitioners' motion for partial summary judgment. *Curtis v. Curtis*, 104 N.C. App. 625, 410 S.E.2d 917 (1991).

Dual Burden of Proof Where Child Was Native American. — Where a minor child's status as a Native Ameri-

can made a termination proceeding under this Article also subject to the provisions of the Indian Child Welfare Act (25 U.S.C. 1901 et seq.), the federal provision did not require that the North Carolina statutory grounds to terminate parental rights be proven beyond a reasonable doubt. Rather, a dual burden of proof was created in which the state provisions and federal provisions had to be satisfied separately; i.e., the state grounds for termination had to be supported by clear and convincing evidence, while the federal law required evidence which justified termination beyond a reasonable doubt. In *re Bluebird*, 105 N.C. App. 42, 411 S.E.2d 820 (1992).

Cited in *In re Barnes*, 97 N.C. App. 325, 388 S.E.2d 237 (1990).

§ 7A-289.23. Jurisdiction.

CASE NOTES

Cited in *In re Trueman*, 99 N.C. App. 579, 393 S.E.2d 569 (1990).

§ 7A-289.25. Petition.

CASE NOTES

Invocation of Court's Jurisdiction. — Like the verified pleadings in divorce and juvenile actions, verified petitions for the termination of parental rights

are necessary to invoke the jurisdiction of the court over the subject matter. In *re Triscari Children*, 109 N.C. App. 285, 426 S.E.2d 435 (1993).

When an incarcerated parent is denied transportation to the hearing in contested termination cases, the better practice is for the court, when so moved, to provide the funds necessary for the deposing of the incarcerated parent. The parent's deposition, combined with representation by counsel at the hearing, will ordinarily provide sufficient participation by the incarcerated parent so as to reduce the risk of error attributable to his absence to a level consistent with due process. In *re* Quevedo, 106 N.C. App. 574, 419 S.E.2d 158, appeal dismissed, 332 N.C. 483, 424 S.E.2d 397 (1992).

Petition Held Sufficient. — Although petitioners' bare recitation of the alleged statutory grounds for termination did not comply with the requirement in subdivision (6) of this section that the petition state "facts which are sufficient to warrant a determination" that grounds exist to warrant termination, the petition incorporated an attached custody award, and the custody award stated sufficient facts to warrant such a determination. In *re* Quevedo, 106 N.C. App. 574, 419 S.E.2d 158, appeal dismissed, 332 N.C. 483, 424 S.E.2d 397 (1992).

§ 7A-289.28. Failure of respondents to answer.

CASE NOTES

The absence of an answer denying any of the material allegations of the petition does not authorize the trial court to enter a "default type" order terminating the respondent's parental rights. In *re* Tyner, 106 N.C. App. 480, 417 S.E.2d 260 (1992).

Sufficiency of Answer. — Respon-

dent's letter addressed to his attorney which the attorney filed with the trial court at sometime on the day of the hearing did not constitute an answer to the petition. In *re* Tyner, 106 N.C. App. 480, 417 S.E.2d 260 (1992).

Cited in *In re* Becker, 111 N.C. App. 85, 431 S.E.2d 820 (1993).

§ 7A-289.29. Answer of respondents.

(a) Any respondent may file a written answer to the petition. The answer shall admit or deny the allegations of the petition and shall set forth the name and address of the answering respondent or his or her attorney.

(b) If an answer denies any material allegation of the petition, the court shall appoint a guardian ad litem for the child to represent the best interests of the child, unless the petition was filed by the guardian ad litem pursuant to G.S. 7A-289.24(6). A licensed attorney shall be appointed to assist those guardians ad litem who are not attorneys licensed to practice in North Carolina. The appointment, duties and payment of the guardian ad litem shall be the same as in G.S. 7A-586 and 7A-588. The court shall conduct a special hearing after notice of not less than 10 days nor more than 30 days to the petitioner, the answering respondent(s), and the guardian ad litem for the child, to determine the issues raised by the petition and answer(s). Notice of the hearing shall be deemed to have been given upon the depositing thereof in the United States mail, first-class postage prepaid, and addressed to the petitioner, respondent, and guardian ad litem or their counsel of record, at the addresses appearing in the petition and responsive pleading.

(c) In proceedings under this Article, the appointment of a guardian ad litem shall not be required except, as provided above, in cases in which an answer is filed denying material allegations, or as required under G.S. 7A-289.23; but the court may, in its discretion, appoint a guardian ad litem for a child, either before or after

determining the existence of grounds for termination of parental rights, in order to assist the court in determining the best interests of the child.

(d) If a guardian ad litem has previously been appointed for the child under G.S. 7A-586, and the appointment of a guardian ad litem could also be made under this section, the guardian ad litem appointed under G.S. 7A-586, and any attorney appointed to assist that guardian, shall also represent the child in all proceedings under this Article and shall have the duties and payment of a guardian ad litem appointed under this section, unless the court determines that the best interests of the child require otherwise. (1977, c. 879, s. 8; 1981 (Reg. Sess., 1982), c. 1331, s. 3; 1983, c. 870, s. 2; 1989 (Reg. Sess., 1990), c. 851, s. 1.)

Effect of Amendments. — The 1989 (Reg. Sess., 1990) amendment, effective

July 6, 1990, added subsections (c) and (d).

CASE NOTES

Notice When Hearing Is Continued. — Subsection (b) of this section does not prescribe the rules for notice when a hearing is continued. *Herell v. Taylor*, 97 N.C. App. 57, 387 S.E.2d 230 (1990).

A brief special hearing to determine the issues raised by the pleadings held just prior to the trial does not conflict with the requirements of subsec-

tion (b) of this section. *Herell v. Taylor*, 97 N.C. App. 57, 387 S.E.2d 230 (1990).

Sufficiency of Answer. — Respondent's letter addressed to his attorney which the attorney filed with the trial court at sometime on the day of the hearing did not constitute an answer to the petition. *In re Tyner*, 106 N.C. App. 480, 417 S.E.2d 260 (1992).

Applied in *In re Barnes*, 97 N.C. App. 325, 388 S.E.2d 237 (1990).

§ 7A-289.30. Adjudicatory hearing on termination.

CASE NOTES

Failure to Make Reasonable Progress. — Record held to demonstrate a failure on the part of parents to make reasonable progress toward improving home conditions during the period in which parents' children were in foster care, despite the fact that they showed a willingness to provide for the children during part of the time at issue. *Herell v. Taylor*, 97 N.C. App. 57, 387 S.E.2d 230 (1990).

Stated in *In re McMahon*, 98 N.C. App. 92, 389 S.E.2d 632 (1990).

Cited in *In re Barnes*, 97 N.C. App. 325, 388 S.E.2d 237 (1990); *Curtis v. Curtis*, 104 N.C. App. 625, 410 S.E.2d 917 (1991); *In re Tyner*, 106 N.C. App. 480, 417 S.E.2d 260 (1992); *In re Becker*, 111 N.C. App. 85, 431 S.E.2d 820 (1993).

§ 7A-289.31. Disposition.

CASE NOTES

Termination of Both Parents' Parental Rights. — Where the trial court properly concluded that grounds for termination existed, as set forth in § 7A-289.32(7), the court did not abuse its discretion in finding that it was in the best interests of the child to termi-

nate both parents' parental rights. *In re Gynn*, 113 N.C. App. 114, 437 S.E.2d 532 (1993).

Applied in *In re Roberson*, 97 N.C. App. 277, 387 S.E.2d 668 (1990); *In re McMahon*, 98 N.C. App. 92, 389 S.E.2d

632 (1990); In re Bluebird, 105 N.C. 325, 388 S.E.2d 237 (1990); In re Tyner, App. 42, 411 S.E.2d 820 (1992). 106 N.C. App. 480, 417 S.E.2d 260 Cited in In re Barnes, 97 N.C. App. (1992).

§ 7A-289.32. Grounds for terminating parental rights.

The court may terminate the parental rights upon a finding of one or more of the following:

- (1) Repealed by Session Laws 1979, c. 669, s. 2.
- (2) The parent has abused or neglected the child. The child shall be deemed to be abused or neglected if the court finds the child to be an abused child within the meaning of G.S. 7A-517(1), or a neglected child within the meaning of G.S. 7A-517(21).
- (3) The parent has willfully left the child in foster care for more than 12 months without showing to the satisfaction of the court that reasonable progress under the circumstances has been made within 12 months in correcting those conditions which led to the removal of the child or without showing positive response within 12 months to the diligent efforts of a county Department of Social Services, a child-caring institution or licensed child-placing agency to encourage the parent to strengthen the parental relationship to the child or to make and follow through with constructive planning for the future of the child. Provided, however, that no parental rights shall be terminated for the sole reason that the parents are unable to care for the child on account of their poverty.
- (3a) The burden in such proceedings shall be upon the petitioner to prove the facts justifying such termination by clear and convincing evidence.
- (4) The child has been placed in the custody of a county Department of Social Services, a licensed child-placing agency, a child-caring institution, or a foster home, and the parent, for a continuous period of six months next preceding the filing of the petition, has willfully failed for such period to pay a reasonable portion of the cost of care for the child although physically and financially able to do so.
- (5) One parent has been awarded custody of the child by judicial decree, or has custody by agreement of the parents, and the other parent whose parental rights are sought to be terminated has for a period of one year or more next preceding the filing of the petition willfully failed without justification to pay for the care, support, and education of the child, as required by said decree or custody agreement.
- (6) The father of a child born out of wedlock has not prior to the filing of a petition to terminate his parental rights:
 - a. Establish(ed) paternity judicially or by affidavit which has been filed in a central registry maintained by the Department of Human Resources; provided, the court shall inquire of the Department of Human Resources as to whether such an affidavit has been so filed and shall incorporate into the case record the Department's certified reply; or

- b. Legitimated the child pursuant to provisions of G.S. 49-10, or filed a petition for this specific purpose; or
 - c. Legitimated the child by marriage to the mother of the child; or
 - d. Provided substantial financial support or consistent care with respect to the child and mother.
- (7) That the parent is incapable as a result of mental retardation, mental illness, organic brain syndrome, or any other degenerative mental condition of providing for the proper care and supervision of the child, such that the child is a dependent child within the meaning of G.S. 7A-517(13), and that there is a reasonable probability that such incapability will continue throughout the minority of the child.
- (8) The parent has willfully abandoned the child for at least six consecutive months immediately preceding the filing of the petition. For the purpose of this subdivision, a child may be willfully abandoned by his or her natural father if the mother of the child had been willfully abandoned by and was living separate and apart from the father at the time of the child's birth, although the father may not have known of such birth; but in any event the child must be over the age of three months at the time of the filing of the petition. (1977, c. 879, s. 8; 1979, c. 669, s. 2; 1979, 2nd Sess., c. 1088, s. 2; c. 1206, s. 2; 1983, c. 89, s. 2; c. 512; 1985, c. 758, ss. 2, 3; c. 784; 1991 (Reg. Sess., 1992), c. 941, s. 1.)

Effect of Amendments. — The 1991 (Reg. Sess., 1992) amendment, effective October 1, 1992, and applicable to cases filed on and after that date, substituted "12 months" for "18 months" in three places in the first sentence of subdivision (3).

Legal Periodicals. —

For note, "Minimizing the Putative Father's Rights: In re Adoption of Clark," see 68 N.C. L. Rev. 1257 (1990).

CASE NOTES

- I. General Consideration.
- V. Illustrative Cases.
- VI. Willfully Leaving Child in Foster Care.
- VII. Failure to Establish Paternity, Legitimate Child, or Provide Support or Care.
- VIII. Failure to Pay Support Required by Decree or Agreement.

I. GENERAL CONSIDERATION.

The definition of mental retardation adopted by our legislature in § 122C-3(22) represents the plain meaning of the term "mental retardation" used in subsection (7). In re LaRue, 113 N.C. App. 807, 440 S.E.2d 301 (1994).

Finding of Any One of the Enumerated Grounds, etc. —

In accord with the main volume. See Herell v. Taylor, 97 N.C. App. 57, 387 S.E.2d 230 (1990).

Dual Burden of Proof Where Child Was American Indian. — Where a minor child's status as a Native American made a termination proceeding un-

der this Article also subject to the provisions of the Indian Child Welfare Act (25 U.S.C. 1901 et seq.), the federal provision did not require that the North Carolina statutory grounds to terminate parental rights be proven beyond a reasonable doubt. Rather, a dual burden of proof was created in which the state provisions and federal provisions had to be satisfied separately; i.e., the state grounds for termination had to be supported by clear and convincing evidence, while the federal law required evidence which justified termination beyond a reasonable doubt. In re Bluebird, 105 N.C. App. 42, 411 S.E.2d 820 (1992).

Evidence was sufficient to support termination of parental rights, where mother did not attend any counseling sessions, had three criminal convictions, failed to attend some of the scheduled visits with the children, and willfully paid no child support. In re Becker, 111 N.C. App. 85, 431 S.E.2d 820 (1993).

The Department of Social Services provided sufficient evidence to withstand motion to dismiss termination proceedings, where the father willfully left the minor children in foster care for more than 18 months and the father had been incarcerated two times during the period that the children were in foster care. In re Becker, 111 N.C. App. 85, 431 S.E.2d 820 (1993).

Earlier decision setting aside termination order did not "void" basis of subsequent adoption proceeding or earlier termination proceeding, but simply held that termination order had to be set aside since service on putative father was void. In re Clark, 95 N.C. App. 1, 381 S.E.2d 835 (1989).

Applied in In re McMahon, 98 N.C. App. 92, 389 S.E.2d 632 (1990); In re Quevedo, 106 N.C. App. 574, 419 S.E.2d 158 (1992).

Cited in In re Trueman, 99 N.C. App. 579, 393 S.E.2d 569 (1990); In re Adoption of Clark, 327 N.C. 61, 393 S.E.2d 791 (1990); Curtis v. Curtis, 104 N.C. App. 625, 410 S.E.2d 917 (1991); In re Tyner, 106 N.C. App. 480, 417 S.E.2d 260 (1992); Richard v. Michna, 110 N.C. App. 810, 431 S.E.2d 485 (1993).

V. ILLUSTRATIVE CASES.

Mental Illness of Parent. — Department of Social Services failed to prove by clear and convincing evidence that due to mental illness, mother was incapable of providing for the care and supervision of her children, where the only evidence offered by DSS to show that mother was mentally incapable of caring for her children was the testimony of doctor who testified that the fact that someone carries a diagnosis of personality disorder does not mean that that person is incapable of raising children and that mother's pattern of behavior by itself did not mean that she was incapable of taking care of her children. In re Scott, 95 N.C. App. 760, 383 S.E.2d 690, cert. denied, 325 N.C. 708, 388 S.E.2d 459 (1989).

Department of Social Services failed to show by clear and convincing evidence that there was a reasonable prob-

ability that mother's mental illness would continue throughout the minority of her children, where doctor could not predict within a reasonable probability that mother's mental illness would so continue and where doctor testified that mother was currently experiencing her longest sustained period of improvement and that she had dealt with the stress of the hearing in a positive manner. In re Scott, 95 N.C. App. 760, 383 S.E.2d 690, cert. denied, 325 N.C. 708, 388 S.E.2d 459 (1989).

Mental Retardation. — The appellate court would not incorporate a diligent efforts mandate in a statute devoid of such language; if due diligence is to be a requirement of the mental retardation ground for termination, that is a matter for the legislature, the courts having no right to expand statutory terms. In re Guynn, 113 N.C. App. 114, 437 S.E.2d 532 (1993).

Failure to Show Positive Response to Efforts of DSS. — Record supported judge's finding of parents' failure to show a positive response to the continuing efforts of the Department of Social Services to assist them so as to reestablish the family unit. Herell v. Taylor, 97 N.C. App. 57, 387 S.E.2d 230 (1990).

Rights Not Properly Terminated.

— There was not clear, cogent, and convincing evidence of mental retardation of either parent to justify terminating their parental rights. In re LaRue, 113 N.C. App. 807, 440 S.E.2d 301 (1994).

Rights Properly Terminated. — Trial court properly considered all of the evidence in concluding as law that minor children were neglected juveniles and then properly terminated the parental rights of the parents pursuant to this section. Smith v. Alleghany County Dep't of Social Servs., 114 N.C. App. 727, 443 S.E.2d 101 (1994).

VI. WILLFULLY LEAVING CHILD IN FOSTER CARE.

Period of Foster Care Need Not Be Continuous. — In view of the 1985 amendment to subdivision (3) of this section, which prior to the amendment required the parent to have left the child in foster care "for more than two consecutive years," but was amended to shorten the period to an excess of 18 months (now 12 months) and to eliminate the word "consecutive," the period of foster care need not be 18 continuous

months. *Herrell v. Taylor*, 97 N.C. App. 57, 387 S.E.2d 230 (1990).

The grounds which render a putative father's consent to adoption unnecessary under § 48-6(a)(3) are identical to the grounds for terminating his parental rights under subdivision (6) of this section. While termination of a putative father's rights may precede an adoption petition, prior termination of his rights under this Chapter is not necessary if, under the applicable provisions of Chapter 48, his consent to the adoption is not necessary; his parental rights are then terminated by the final order of adoption under § 48-23. In *re Clark*, 95 N.C. App. 1, 381 S.E.2d 835 (1989), *rev'd* on other grounds, 327 N.C. 61, 393 S.E.2d 791 (1990).

VII. FAILURE TO ESTABLISH PATERNITY, LEGITIMATE CHILD, OR PROVIDE SUPPORT OR CARE.

Knowledge of Child's Existence on Part of Father at Time of Filing Petition. — Section 48-6(a)(3) reflects the same legislative choices evident in the termination of a putative father's rights under subdivision (6) of this section; under neither statute is the illegitimate child's future welfare dependent on whether or not the putative father knows of the child's existence at the time the petition is filed. In *re Clark*, 95 N.C. App. 1, 381 S.E.2d 835 (1989), *rev'd* on other grounds, 327 N.C. 61, 393 S.E.2d 791 (1990).

Personal Jurisdiction. — Personal jurisdiction did not require minimum

contacts with the State in a petition to terminate the parental rights of a non-resident father of a child born out of wedlock who failed to establish paternity, legitimate his child, or provide substantial financial support or care to the child and mother. In *re Baby Boy Dixon*, 112 N.C. App. 248, 435 S.E.2d 352 (1993).

VIII. FAILURE TO PAY SUPPORT REQUIRED BY DECREE OR AGREEMENT.

Proof Required under Subdivision (5). — In a termination action under subdivision (5) of this section, based upon respondent's willful failure without justification to provide support, petitioner must prove the existence of a support order that was enforceable during the year before the termination petition was filed; consequently, because a proper decree for child support will be based on the supporting parent's ability to pay as well as the child's needs, there is no requirement that petitioner independently prove or that the termination order find as fact respondent's ability to pay support during the relevant statutory time period. In *re Roberson*, 97 N.C. App. 277, 387 S.E.2d 668 (1990).

Ability to Pay Shown. — Evidence was sufficient to show that father had the ability to pay some support during the six-month period preceding the filing of termination petition, despite his incarceration and his alleged medical disability. In *re Becker*, 111 N.C. App. 85, 431 S.E.2d 820 (1993).

§ 7A-289.33. Effects of termination order.

CASE NOTES

Quoted in *Swing v. Garrison*, 112 N.C. App. 818, 436 S.E.2d 895 (1993).

ARTICLE 25.

*Jurisdiction and Procedure in Criminal Appeals from District Courts.***§ 7A-290. Appeals from district court in criminal cases; notice; appeal bond.**

CASE NOTES

I. General Consideration.

I. GENERAL CONSIDERATION.

Cited in *State v. Brunson*, 327 N.C. 244, 393 S.E.2d 860 (1990).

ARTICLE 26.

*Additional Powers of District Court Judges and Magistrates.***§ 7A-291. Additional powers of district court judges.**

CASE NOTES

No Power When No Action Pending. — Without an action pending before it, the district court was without jurisdiction to enter an order pursuant to § 7A-291(6). In *re Transp. of Juveniles*, 102 N.C. App. 806, 403 S.E.2d 557 (1991).

This statute was not intended to give a district court judge the power to enter an order *ex mero motu* when no action is before the court. In *re Transp. of Juveniles*, 102 N.C. App. 806, 403 S.E.2d 557 (1991).

§ 7A-292. Additional powers of magistrates.

In addition to the jurisdiction and powers assigned in this Chapter to the magistrate in civil and criminal actions, each magistrate has the following additional powers:

- (1) To administer oaths;
- (2) To punish for direct criminal contempt subject to the limitations contained in Chapter 5A of the General Statutes of North Carolina;
- (3) When authorized by the chief district judge, to take depositions and examinations before trial;
- (4) To issue subpoenas and capiases valid throughout the county;
- (5) To take affidavits for the verification of pleadings;
- (6) To issue writs of habeas corpus *ad testificandum*, as provided in G.S. 17-41;

- (7) To assign a year's allowance to the surviving spouse and a child's allowance to the children as provided in Chapter 30, Article 4, of the General Statutes;
- (8) To take acknowledgments of instruments, as provided in G.S. 47-1;
- (9) To perform the marriage ceremony, as provided in G.S. 51-1;
- (10) To take acknowledgment of a written contract or separation agreement between husband and wife; and
- (11) Repealed by Session Laws 1973, c. 503, s. 9.
- (12) To assess contribution for damages or for work done on a dam, canal, or ditch, as provided in G.S. 156-15.
- (13) Repealed by Session Laws 1973, c. 503, s. 9. (1965, c. 310, s. 1; 1967, c. 691, s. 25; 1971, c. 377, s. 17; 1973, c. 503, s. 9; 1977, c. 375, s. 4; 1979, 2nd Sess., c. 1080, s. 6; 1994, Ex. Sess., c. 4, s. 4.)

Effect of Amendments. — The 1994 Extra Session amendment, effective May 1, 1994, and applicable to motions for emergency relief from domestic vio-

lence filed on or after that date, added "and" at the end of subdivision (10) and deleted "and" at the end of subdivision (12).

SUBCHAPTER VI. REVENUES AND EXPENSES OF THE JUDICIAL DEPARTMENT.

ARTICLE 27.

Expenses of the Judicial Department.

§ 7A-300. Expenses paid from State funds.

CASE NOTES

Facilities for Judicial System. — Our statutes obligate counties and cities to provide physical facilities for the judicial system operating within their boundaries. These facilities must be ade-

quate to serve the functioning of the judiciary within the borders of those political subdivisions. In re Alamance County Ct. Facilities, 329 N.C. 84, 405 S.E.2d 125 (1991).

§ 7A-302. Counties and municipalities responsible for physical facilities.

CASE NOTES

Duty to Provide Physical Facilities for Judicial System. — Our statutes obligate counties and cities to provide physical facilities for the judicial system operating within their boundaries. These facilities must be adequate to serve the functioning of the judiciary within the borders of those political subdivisions. In re Alamance County Ct.

Facilities, 329 N.C. 84, 405 S.E.2d 125 (1991).

Counties in which a district court has been established have an absolute statutory duty to provide judicial facilities. In re Alamance County Ct. Facilities, 329 N.C. 84, 405 S.E.2d 125 (1991).

Order to Inquire into Adequacy of Facilities Held Flawed. — A hearing

ordered by a superior court judge to inquire into the adequacy of the Alamance County court facilities probes the scope of the court's inherent power to direct county commissioners to ameliorate such facilities and the proper means of effecting that end. Such power exists, but the order invoking it was procedurally and substantively flawed where the commissioners against whom the order

was directed were not made parties to the action, the order was ex parte, and the order intruded on discretion that properly belonged to the commissioners. *In re Alamance County Ct. Facilities*, 329 N.C. 84, 405 S.E.2d 125 (1991).

Cited in *In re Alamance County Ct. Facilities*, 329 N.C. 84, 405 S.E.2d 125 (1991).

ARTICLE 28.

Uniform Costs and Fees in the Trial Divisions.

§ 7A-304. Costs in criminal actions.

(a) In every criminal case in the superior or district court, wherein the defendant is convicted, or enters a plea of guilty or nolo contendere, or when costs are assessed against the prosecuting witness, the following costs shall be assessed and collected, except that when the judgment imposes an active prison sentence, costs shall be assessed and collected only when the judgment specifically so provides, and that no costs may be assessed when a case is dismissed.

- (1) For each arrest or personal service of criminal process, including citations and subpoenas, the sum of five dollars (\$5.00), to be remitted to the county wherein the arrest was made or process was served, except that in those cases in which the arrest was made or process served by a law-enforcement officer employed by a municipality, the fee shall be paid to the municipality employing the officer.
- (2) For the use of the courtroom and related judicial facilities, the sum of six dollars (\$6.00) in the district court, including cases before a magistrate, and the sum of twenty-four dollars (\$24.00) in superior court, to be remitted to the county in which the judgment is rendered. In all cases where the judgment is rendered in facilities provided by a municipality, the facilities fee shall be paid to the municipality. Funds derived from the facilities fees shall be used exclusively by the county or municipality for providing, maintaining, and constructing adequate courtroom and related judicial facilities, including: adequate space and furniture for judges, district attorneys, public defenders, magistrates, juries, and other court related personnel; office space, furniture and vaults for the clerk; jail and juvenile detention facilities; free parking for jurors; and a law library (including books) if one has heretofore been established or if the governing body hereafter decides to establish one. In the event the funds derived from the facilities fees exceed what is needed for these purposes, the county or municipality may, with the approval of the Administrative Officer of the Courts as to the amount, use any or all of the excess to retire outstanding indebtedness incurred in the construction of the facilities, or to reimburse the county or municipality for funds expended in constructing or renovating the facilities (without incurring any indebt-

edness) within a period of two years before or after the date a district court is established in such county, or to supplement the operations of the General Court of Justice in the county.

(3) For the retirement and insurance benefits of both State and local government law-enforcement officers, the sum of seven dollars and twenty-five cents (\$7.25), to be remitted to the State Treasurer. Fifty cents (50¢) of this sum shall be administered as is provided in Article 12C of Chapter 143 of the General Statutes. Five dollars and seventy-five cents (\$5.75) of this sum shall be administered as is provided in Article 12E of Chapter 143 of the General Statutes, with one dollar and twenty-five cents (\$1.25) being administered in accordance with the provisions of G.S. 143-166.50(e). One dollar (\$1.00) of this sum shall be administered as is provided in Article 12F of Chapter 143 of the General Statutes.

(3a) For the supplemental pension benefits of sheriffs, the sum of seventy-five cents (75¢), to be remitted to the Department of Justice and administered under the provisions of Article 12G of Chapter 143 of the General Statutes.

(4) For support of the General Court of Justice, the sum of forty-one dollars (\$41.00) in the district court, including cases before a magistrate, and the sum of forty-eight dollars (\$48.00) in the superior court, to be remitted to the State Treasurer.

(5) For using pretrial release services, the district or superior court judge shall, upon conviction, impose a fee of fifteen dollars (\$15.00) to be remitted to the county providing the pretrial release services. This cost shall be assessed and collected only if the defendant had been accepted and released to the supervision of the agency providing the pretrial release services.

(6) For support of the General Court of Justice, for the issuance by the clerk of a report to the Division of Motor Vehicles pursuant to G.S. 20-24.2, the sum of fifty dollars (\$50.00), to be remitted to the State Treasurer. Upon a showing to the court that the defendant failed to appear because of an error or omission of a judicial official, a prosecutor, or a law-enforcement officer, the court shall waive this fee.

(a1) The costs assessed pursuant to subsection (a) may also be collected by clerks of court for charges in which a party elects to pay the court's costs to satisfy the requirements of G.S. 20-7.2. Costs collected pursuant to this subsection shall be allocated in the same manner as other costs collected pursuant to this section. If a party elects to pay the costs of court to satisfy the requirements of G.S. 20-7.2 and is subsequently adjudged guilty of the same charge by the court, he shall not be required to pay the costs of court again for that charge, but he is subject to any other orders of the court, including an order to pay a fine.

(b) On appeal, costs are cumulative, and costs assessed before a magistrate shall be added to costs assessed in the district court, and costs assessed in the district court shall be added to costs assessed in the superior court, except that the fee for the Law-Enforcement Officers' Benefit and Retirement Fund and the Sheriffs' Supplemental Pension Fund and the fee for pretrial release services shall

be assessed only once in each case. No superior court costs shall be assessed against a defendant who gives notice of appeal from the district court but withdraws it prior to the expiration of the 10-day period for entering notice of appeal. When a case is reversed on appeal, the defendant shall not be liable for costs, and the State shall be liable for the cost of printing records and briefs in the Appellate Division.

(c) Witness fees, expenses for blood tests and comparisons incurred by G.S. 8-50.1(a), jail fees and cost of necessary trial transcripts shall be assessed as provided by law in addition to other costs set out in this section. Nothing in this section shall limit the power or discretion of the judge in imposing fines or forfeitures or ordering restitution.

(d) In any criminal case in which the liability for costs, fines, restitution, or any other lawful charge has been finally determined, the clerk of superior court shall, unless otherwise ordered by the presiding judge, disburse such funds when paid in accordance with the following priorities:

- (1) Costs due the county;
- (2) Costs due the city;
- (3) Fines to the county school fund;
- (4) Sums in restitution prorated among the persons entitled thereto;
- (5) Costs due the State;
- (6) Attorney's fees.

Sums in restitution received by the clerk of superior court shall be disbursed when:

- (1) Complete restitution has been received; or
- (2) When, in the opinion of the clerk, additional payments in restriction will not be collected; or
- (3) Upon the request of the person or persons entitled thereto; and
- (4) In any event, at least once each calendar year.

(e) Unless otherwise provided by law, the costs assessed pursuant to this section for criminal actions disposed of in the district court are also applicable to infractions disposed of in the district court. The costs assessed in superior court for criminal actions appealed from district court to superior court are also applicable to infractions appealed to superior court. If an infraction is disposed of in the superior court pursuant to G.S. 7A-271(d), costs applicable to the original charge are applicable to the infraction. (1965, c. 310, s. 1; 1967, c. 601, s. 2; c. 691, ss. 27-29; c. 1049, s. 5; 1969, c. 1013, s. 3; c. 1190, ss. 28, 29; 1971, c. 377, ss. 19-21; c. 1129; 1973, c. 47, s. 2; 1975, c. 558, ss. 1, 2; 1975, 2nd Sess., c. 980, s. 1; 1979, c. 576, s. 3; 1981, c. 369; c. 691, s. 1; c. 896, s. 2; c. 959, s. 1; 1983, c. 713, ss. 2, 3; 1983 (Reg. Sess., 1984), c. 1034, s. 249; 1985, c. 479, s. 196(a); c. 729, ss. 2-4; c. 764, s. 17; 1986, Ex. Sess., c. 5; 1985 (Reg. Sess., 1986), c. 852, s. 17; c. 1015, s. 1; 1989, c. 664, ss. 1, 2; c. 786, s. 1; 1989 (Reg. Sess., 1990), c. 1044, s. 1; 1991, c. 742, s. 15(a); 1991 (Reg. Sess., 1992), c. 811, s. 1; 1993, c. 313, s. 2.)

Editor's Note. —

Session Laws 1991 (Reg. Sess., 1992), c. 811, which amended this section, in s. 9 provides: "Sections 1 through 6 and Section 8 become effective July 1, 1992.

Section 7 of this act is effective for taxable years beginning on or after January 1, 1992. Sections 1 through 5 of this act shall apply to all fees assessed or paid on and after July 1, 1992."

Section 20-7.2, referred to in this section, was repealed by Session Laws 1987, c. 581, s. 2.

Session Laws 1991, c. 742, s. 15(c) provides: "This section shall apply to all cases pending on or commenced on or after July 1, 1991."

Effect of Amendments. —

The 1989 (Reg. Sess., 1990) amendment, effective October 1, 1990, and applicable to process served on or after that date, in subdivision (a)(1), substituted "five dollars (\$5.00)" for "four dollars (\$4.00)."

The 1991 amendment, effective July 1, 1991, in subdivision (a)(4), substituted "thirty-seven dollars (\$37.00)" for "thirty-three dollars (\$33.00)", and substituted "forty-four dollars (\$44.00)" for "forty dollars (\$40.00)." As to the appli-

cability of this amendment, see the Editor's Note.

Session Laws 1991 (Reg. Sess., 1992), c. 811, s. 1, in subsection (a), in subdivision (2), in the first sentence substituted "six dollars (\$6.00)" for "five dollars (\$5.00)" and "twenty-four dollars (\$24.00)" for "twenty-three dollars (\$23.00)", and in subdivision (4) substituted "forty-one dollars (\$41.00)" for "thirty-seven dollars (\$37.00)" and "forty-eight dollars (\$48.00)" for "forty-four dollars (\$44.00)". As to the effective date and applicability of this amendment, see the Editor's Note.

The 1993 amendment, effective July 15, 1993, and applicable to reports issued on or after that date, added subdivision (a)(6).

CASE NOTES

Trial judges are authorized to tax court costs, and if the court misused its authority in taxing costs against pauper plaintiff, that error was waived by her

failure to appeal therefrom. *Schaffner v. Pantelakos*, 98 N.C. App. 399, 391 S.E.2d 41 (1990).

§ 7A-305. Costs in civil actions.

(a) In every civil action in the superior or district court the following costs shall be assessed:

- (1) For the use of the courtroom and related judicial facilities, the sum of six dollars (\$6.00) in cases heard before a magistrate, and the sum of ten dollars (\$10.00) in district and superior court, to be remitted to the county in which the judgment is rendered, except that in all cases in which the judgment is rendered in facilities provided by a municipality, the facilities fee shall be paid to the municipality. Funds derived from the facilities fees shall be used in the same manner, for the same purposes, and subject to the same restrictions, as facilities fees assessed in criminal actions.
- (2) For support of the General Court of Justice, the sum of fifty-five dollars (\$55.00) in the superior court, and the sum of forty dollars (\$40.00) in the district court except that if the case is assigned to a magistrate the sum shall be twenty-eight dollars (\$28.00). Sums collected under this subsection shall be remitted to the State Treasurer.

(b) On appeal, costs are cumulative, and when cases heard before a magistrate are appealed to the district court, the General Court of Justice fee and the facilities fee applicable in the district court shall be added to the fees assessed before the magistrate. When an order of the clerk of the superior court is appealed to either the district court or the superior court, no additional General Court of Justice fee or facilities fee shall be assessed.

(b1) When a defendant files an answer in an action filed as a small claim which requires the entire case to be withdrawn from a

magistrate and transferred to the district court, the difference between the General Court of Justice fee and facilities fee applicable to the district court and the General Court of Justice fee and facilities fee applicable to cases heard by a magistrate shall be assessed. The defendant is responsible for paying the fee.

(c) The clerk of superior court, at the time of the filing of the papers initiating the action or the appeal, shall collect as advance court costs, the facilities fee and General Court of Justice fee, except in suits by an indigent. The clerk shall also collect the fee for discovery procedures under Rule 27(a) and (b) at the time of the filing of the verified petition.

(d) The following expenses, when incurred, are also assessable or recoverable, as the case may be:

- (1) Witness fees, as provided by law.
- (2) Jail fees, as provided by law.
- (3) Counsel fees, as provided by law.
- (4) Expense of service of process by certified mail and by publication.
- (5) Costs on appeal to the superior court, or to the appellate division, as the case may be, of the original transcript of testimony, if any, insofar as essential to the appeal.
- (6) Fees for personal service and civil process and other sheriff's fees, as provided by law.
- (7) Fees of guardians ad litem, referees, receivers, commissioners, surveyors, arbitrators, appraisers, and other similar court appointees, as provided by law. The fee of such appointees shall include reasonable reimbursement for stenographic assistance, when necessary.
- (8) Fees of interpreters, when authorized and approved by the court.
- (9) Premiums for surety bonds for prosecution, as authorized by G.S. 1-109.

(e) Nothing in this section shall affect the liability of the respective parties for costs as provided by law. (1965, c. 310, s. 1; 1967, c. 108, s. 10; c. 691, s. 30; 1971, c. 377, ss. 23, 24; c. 1181, s. 1; 1973, c. 503, ss. 12-14; c. 1267, s. 3; 1975, c. 558, s. 3; 1975, 2nd Sess., c. 980, ss. 2, 3; 1979, 2nd Sess., c. 1234, s. 1; 1981, c. 555, s. 6; c. 691, s. 2; 1983, c. 713, ss. 4-6; 1989, c. 786, s. 2; 1991, c. 742, s. 15(b); 1991 (Reg. Sess., 1992), c. 811, s. 2; 1993, c. 435, s. 6.)

Editor's Note. —

Session Laws 1991, c. 742, s. 15(c) provides: "This section shall apply to all cases pending on or commenced on or after July 1, 1991."

Session Laws 1991 (Reg. Sess. 1992), c. 811, which amended this section, in s. 9 provides: "Sections 1 through 6 and Section 8 become effective July 1, 1992. Section 7 of this act is effective for taxable years beginning on or after January 1, 1992. Sections 1 through 5 of this act shall apply to all fees assessed or paid on and after July 1, 1992."

Effect of Amendments. —

The 1991 amendment, effective July 1, 1991, in subdivision (a)(2), in the first sentence, substituted "fifty-one dollars

(\$51.00)" for "forty-seven dollars (\$47.00)", substituted "thirty-six dollars (\$36.00)" for "thirty-two dollars (\$32.00)", substituted "twenty-four dollars (\$24.00)" for "twenty dollars (\$20.00)." As to the applicability of this amendment, see the Editor's Note.

Session Laws 1991 (Reg. Sess., 1992), c. 811, s. 2, in subsection (a), in subdivision (1), in the first sentence substituted "six dollars (\$6.00)" for "five dollars (\$5.00)" and "ten dollars (\$10.00)" for "nine dollars (\$9.00)", and in subdivision (2) substituted "fifty-five dollars (\$55.00)" for "fifty-one dollars (\$51.00)", "forty dollars (\$40.00)" for "thirty-six dollars (\$36.00)", and "twenty-eight dollars (\$28.00)" for "twenty-four dollars

(\$24.00)". As to the effective date and applicability of this amendment, see the Editor's Note.

The 1993 amendment, effective October 1, 1993, and applicable to all suits or

appeals prosecuted on or after that date, in the first sentence of subsection (c) substituted "by an indigent" for "in forma pauperis" and in the second sentence substituted "The clerk" for "He".

CASE NOTES

Authority to Tax Costs under § 6-20. — Under this section, which specifies in subsection (d) the costs recoverable in civil actions, and also provides in subsection (e) that nothing in this section shall affect the liability of the respective parties for costs as provided by law, the authority of trial courts to tax

deposition expenses as costs pursuant to § 6-20 remains undisturbed, regardless of the language of § 7A-320. *Alsup v. Pitman*, 98 N.C. App. 389, 390 S.E.2d 750 (1990).

Quoted in *Principal Mut. Life Ins. Co. v. Burnup & Sims, Inc.*, 114 N.C. App. 494, 442 S.E.2d 85 (1994).

§ 7A-306. Costs in special proceedings.

(a) In every special proceeding in the superior court, the following costs shall be assessed:

- (1) For the use of the courtroom and related judicial facilities, the sum of four dollars (\$4.00) to be remitted to the county. Funds derived from the facilities fees shall be used in the same manner, for the same purposes, and subject to the same restrictions, as facilities fees assessed in criminal actions.
- (2) For support of the General Court of Justice the sum of twenty-six dollars (\$26.00). In addition, in proceedings involving land, except boundary disputes, if the fair market value of the land involved is over one hundred dollars (\$100.00), there shall be an additional sum of thirty cents (30¢) per one hundred dollars (\$100.00) of value, or major fraction thereof, not to exceed a maximum additional sum of two hundred dollars (\$200.00). Fair market value is determined by the sale price if there is a sale, the appraiser's valuation if there is no sale, or the appraised value from the property tax records if there is neither a sale nor an appraiser's valuation. Sums collected under this subsection shall be remitted to the State Treasurer.

(b) The facilities fee and twenty-six dollars (\$26.00) of the General Court of Justice fee are payable at the time the proceeding is initiated.

(c) The following additional expenses, when incurred, are assessable or recoverable, as the case may be:

- (1) Witness fees, as provided by law.
- (2) Counsel fees, as provided by law.
- (3) Costs on appeal, of the original transcript of testimony, if any, insofar as essential to the appeal.
- (4) Fees for personal service of civil process, and other sheriff's fees, and for service by publication, as provided by law.
- (5) Fees of guardians ad litem, referees, receivers, commissioners, surveyors, arbitrators, appraisers, and other similar court appointees, as provided by law. The fees of such appointees shall include reasonable reimbursement for stenographic assistance, when necessary.

(d) Costs assessed before the clerk shall be added to costs assessable on appeal to the judge or upon transfer to the civil issue docket.

(e) Nothing in this section shall affect the liability of the respective parties for costs, as provided by law.

(f) This section does not apply to a foreclosure under power of sale in a deed of trust or mortgage. (1965, c. 310, s. 1; 1967, c. 24, s. 2; 1971, c. 377, s. 25; c. 1181, s. 1; 1973, c. 503, s. 15; 1981, c. 691, s. 3; 1983, c. 713, ss. 7-9; c. 881, s. 4; 1985, c. 511, s. 1; 1989, c. 646, s. 1; 1991 (Reg. Sess., 1992), c. 811, s. 3.)

Editor's Note. —

Session Laws 1991 (Reg. Sess., 1992), c. 811, which amended this section, in s. 9 provides: "Sections 1 through 6 and Section 8 become effective July 1, 1992. Section 7 of this act is effective for taxable years beginning on or after January 1, 1992. Sections 1 through 5 of this act shall apply to all fees assessed or paid on and after July 1, 1992."

Effect of Amendments. —

Session Laws 1991 (Reg. Sess., 1992),

c. 811, s. 3, in subsection (a) substituted "four dollars (\$4.00)" for "three dollars (\$3.00)" in the first sentence of subdivision (1), and substituted "twenty-six dollars (\$26.00)" for "twenty-two dollars (\$22.00)" in the first sentence of subdivision (2), and substituted "twenty-six dollars (\$26.00)" for "twenty-two dollars (\$22.00)" in subsection (b). As to the effective date and applicability of this amendment, see the Editor's Note.

§ 7A-307. Costs in administration of estates.

(a) In the administration of the estates of decedents, minors, incompetents, of missing persons, and of trusts under wills and under powers of attorney, and in collections of personal property by affidavit, the following costs shall be assessed:

- (1) For the use of the courtroom and related judicial facilities, the sum of four dollars (\$4.00), to be remitted to the county. Funds derived from the facilities fees shall be used in the same manner, for the same purposes, and subject to the same restrictions, as facilities fees assessed in criminal actions.
- (2) For support of the General Court of Justice, the sum of twenty-six dollars (\$26.00), plus an additional forty cents (40¢) per one hundred dollars (\$100.00), or major fraction thereof, of the gross estate, not to exceed three thousand dollars (\$3,000). Gross estate shall include the fair market value of all personalty when received, and all proceeds from the sale of realty coming into the hands of the fiduciary, but shall not include the value of realty. In collections of personal property by affidavit, the fee based on the gross estate shall be computed from the information in the final affidavit of collection made pursuant to G.S. 28A-25-3 and shall be paid when that affidavit is filed. In all other cases, this fee shall be computed from the information reported in the inventory and shall be paid when the inventory is filed with the clerk. If additional gross estate, including income, comes into the hands of the fiduciary after the filing of the inventory, the fee for such additional value shall be assessed and paid upon the filing of any account or report disclosing such additional value. For each filing the minimum fee shall be ten dollars (\$10.00). Sums collected under this subsection shall be remitted to the State Treasurer.

- (2a) Notwithstanding subdivision (2) of this subsection, the fee of forty cents (40¢) per one hundred dollars (\$100.00), or major fraction, of the gross estate, not to exceed three thousand dollars (\$3,000), shall not be assessed on personalty received by a trust under a will when the estate of the decedent was administered under Chapters 28 or 28A of the General Statutes. Instead, a fee of fifteen dollars (\$15.00) shall be assessed on the filing of each annual and final account.
- (2b) Notwithstanding subdivisions (1) and (2) of this subsection, no costs shall be assessed when the estate is administered or settled pursuant to G.S. 28A-25-6.
- (3) For probate of a will without qualification of a personal representative, the clerk shall assess a facilities fee as provided in subdivision (1) of this subsection and shall assess for support of the General Court of Justice, the sum of seventeen dollars (\$17.00).
- (b) In collections of personal property by affidavit, the facilities fee and twenty-six dollars (\$26.00) of the General Court of Justice fee shall be paid at the time of filing the qualifying affidavit pursuant to G.S. 28A-25-1. In all other cases, these fees shall be paid at the time of filing of the first inventory. If the sole asset of the estate is a cause of action, the thirty dollars (\$30.00) shall be paid at the time of the qualification of the fiduciary.
- (b1) The clerk shall assess the following miscellaneous fees:
- | | |
|---|---------|
| (1) Filing and indexing a will with no probate | |
| — first page | \$ 1.00 |
| — each additional page or fraction thereof | .25 |
| (2) Issuing letters to fiduciaries, per letter over five letters issued | 1.00 |
| (3) Inventory of safe deposits of a decedent, per box, per day | 15.00 |
| (4) Taking a deposition | 5.00 |
| (5) Docketing and indexing a will probated in another county in the State | |
| — first page | 1.00 |
| — each additional page or fraction thereof | .25 |
- (c) The following additional expenses, when incurred, are also assessable or recoverable, as the case may be:
- (1) Witness fees, as provided by law.
 - (2) Counsel fees, as provided by law.
 - (3) Costs on appeal, of the original transcript of testimony, if any, insofar as essential to the appeal.
 - (4) Fees for personal service of civil process, and other sheriff's fees, as provided by law.
 - (5) Fees of guardians ad litem, referees, receivers, commissioners, surveyors, arbitrators, appraisers, and other similar court appointees, as provided by law.
- (d) Costs assessed before the clerk shall be added to costs assessable on appeal to the judge or upon transfer to the civil issue docket.
- (e) Nothing in this section shall affect the liability of the respective parties for costs, as provided by law. (1965, c. 310, s. 1; 1967, c. 691, s. 31; 1969, c. 1190, s. 30; 1971, c. 1181, s. 1; 1973, c. 1335, s. 1; 1981, c. 691, s. 4; 1983, c. 713, ss. 10-17; 1985, c. 481, ss. 1-5; 1985 (Reg. Sess., 1986), c. 855; 1987, c. 837; 1989, c. 719; 1991 (Reg. Sess., 1992), c. 811, ss. 4, 5.)

Editor's Note. —

Session Laws 1991 (Reg. Sess., 1992), c. 811, which amended this section, in s. 9 provides: "Sections 1 through 6 and Section 8 become effective July 1, 1992. Section 7 of this act is effective for taxable years beginning on or after January 1, 1992. Sections 1 through 5 of this act shall apply to all fees assessed or paid on and after July 1, 1992."

Effect of Amendments. —

Session Laws 1991 (Reg. Sess., 1992), c. 811, ss. 4 and 5, in subsection (a) substituted "four dollars (\$4.00)" for "three dollars (\$3.00)" in the first sentence of subdivision (1), in subdivision (2) substi-

tuted "twenty-six dollars (\$26.00)" for "twenty-two dollars (\$22.00)" in the first sentence, and "ten dollars (\$10.00)" for "five dollars (\$5.00)" in the next to last sentence, substituted "fifteen dollars (\$15.00)" for "ten dollars (\$10.00)" in the second sentence of subdivision (2a), and "seventeen dollars (\$17.00)" for "twelve dollars (\$12.00)" in subdivision (3), and in subsection (b) substituted "twenty-six dollars (\$26.00)" for "twenty-two dollars (\$22.00)" in the first sentence, and "thirty dollars (\$30.00)" for "twenty-five dollars (\$25.00)" in the last sentence. As to the effective date and applicability of this amendment, see the Editor's Note.

§ 7A-308. Miscellaneous fees and commissions.

CASE NOTES

Assessment of Subdivision (a)(1) Tax Held Not to Violate Permanent Injunction Against Collection Against United States or its Agencies. — Where power of sale clauses enforced were not in deeds of trust of United States or even of its agencies but were in deeds of trust of lending institutions, terms of consent permanent injunction against collection of tax provided in subdivision (1)(a) of this section (entered into in *United States of America v. State of North Carolina*, No. 83-1576-CIV-5) did not apply. *Whitley v. Griffin*, 737 F. Supp. 345 (E.D.N.C. 1990).

Where at foreclosure sale the lender was the highest bidder and purchaser; a federal agency was named in the foreclosure deed only through assignment of lender's bid; and trustee was required by § 45-21.31(a) to pay foreclosure tax (which is simply an obligation of trustee that must be paid from proceeds of foreclosure sale), ultimate burden of paying tax did not fall upon United States or its agencies. Thus the tax was collectible. *Whitley v. Griffin*, 737 F. Supp. 345 (E.D.N.C. 1990).

Assessing Subdivision (1)(a) Tax Held Not to Violate Supremacy Clause of U.S. Constitution. — Foreclosure tax of subdivision (a)(1) of this section is a nondiscriminatory tax; all trustees who sell real property under power of sale provisions of a deed of trust must pay the tax from sale pro-

ceeds. The only exception arises from the terms of the Consent Permanent Injunction entered into in *United States of America v. State of North Carolina* No. 83-1576-CIV-5; the tax is not unconstitutionally imposed upon proceeds of foreclosure sale but is indiscriminately imposed upon every trustee who sells under power of sale provisions of a deed of trust. The fact that lender is entitled to reimbursement from HUD for two-thirds of foreclosure costs does not alter conclusion that ultimate burden of paying tax is not on federal agency; a portion of the tax is not reimbursed and to allow trustee to avoid the tax on entire purchase price simply because federal agency has a contractual obligation to repay tax would deprive state of collecting one-third of revenues. *Whitley v. Griffin*, 737 F. Supp. 345 (E.D.N.C. 1990).

Since foreclosure tax provided for in subsection (1)(a) of this section is not imposed upon seller (lender), purchaser (borrower) or purchaser's assignee (federal agency) but is levied upon proceeds held by trustee and must be paid by the trustee the fact that the federal government sets forth many requirements and reimburses lender for part of foreclosure costs does not make the foreclosure sale a governmental activity. Therefore, state is not constitutionally prohibited from collecting the tax. *Whitley v. Griffin*, 737 F. Supp. 345 (E.D.N.C. 1990).

§ 7A-311. Uniform civil process fees.

(a) In a civil action or special proceeding, the following fees and commissions shall be assessed, collected, and remitted to the county:

- (1) a. Effective October 1, 1990, for every civil action filed on or after that date, for each item of civil process, including summons, subpoenas, notices, motions, orders, writs and pleadings served, the sum of five dollars (\$5.00). When two or more items of civil process are served simultaneously on one party, only one five dollar (\$5.00) fee shall be charged.
- b. When an item of civil process is served on two or more persons or organizations, a separate service charge shall be made for each person or organization. If the process is served, or attempted to be served, by a city policeman, the fee shall be remitted to the city rather than the county. If the process is served, or attempted to be served by the sheriff, the fee shall be remitted to the county. This subsection shall not apply to service of summons to jurors.
- (2) For the seizure of personal property and its care after seizure, all necessary expenses, in addition to any fees for service of process.
- (3) For all sales by the sheriff of property, either real or personal, or for funds collected by the sheriff under any judgment, five percent (5%) on the first five hundred dollars (\$500.00), and two and one-half percent (2 1/2%) on all sums over five hundred dollars (\$500.00), plus necessary expenses of sale. Whenever an execution is issued to the sheriff, and subsequently while the execution is in force and outstanding, and after the sheriff has served or attempted to serve such execution, the judgment, or any part thereof, is paid directly or indirectly to the judgment creditor, the fee herein is payable to the sheriff on the amount so paid. The judgment creditor shall be responsible for collecting and paying all execution fees on amounts paid directly to the judgment creditor.
- (4) For execution of a judgment of ejectment, all necessary expenses, in addition to any fees for service of process.
- (5) For necessary transportation of individuals to or from State institutions or another state, the same mileage and subsistence allowances as are provided for State employees.

(b) All fees shall be collected in advance (except in suits in forma pauperis) except those contingent on expenses or sales prices. When the fee is not collected in advance or at the time of assessment, a lien shall exist in favor of the county on all property of the party owing the fee. If the fee remains unpaid it shall be entered as a judgment against the debtor and shall be docketed in the judgment docket in the office of the clerk of superior court.

(c) The process fees and commissions set forth in this section are complete and exclusive and in lieu of any and all other process fees and commissions in civil actions and special proceedings. (1965, c. 310, s. 1; 1967, c. 691, s. 34; 1969, c. 1190, s. 31 1/2; 1973, c. 417, ss. 1, 2; c. 503, s. 18; c. 1139; 1979, c. 801, s. 2; 1989 (Reg. Sess., 1990), c. 1044, s. 2.)

Effect of Amendments. — The 1989 (Reg. Sess., 1990) amendment, effective October 1, 1990, and applicable to process served on or after that date, in paragraph a of subdivision (a)(1), deleted the former first two sentences, which read "Effective July 1, 1979, for every civil action filed on or after that date, for each item of civil process, including summons, subpoenas, notices, motions, orders, units and pleadings served, three

dollars (\$3.00). When two or more items of civil process are served simultaneously on one party, only one three-dollar (\$3.00) fee shall be charged"; in the current first sentence substituted "October 1, 1990" for "July 1, 1981," and substituted "the sum of five dollars (\$5.00)" for "four dollars (\$4.00)," and in the last sentence of paragraph a substituted "five dollar (\$5.00)" for "four-dollar (\$4.00)."

§ 7A-314. Uniform fees for witnesses; experts; limit on number.

CASE NOTES

Where witnesses did not testify in obedience to a subpoena, etc. —

In accord with the main volume. See *Brandenburg Land Co. v. Champion Int'l Corp.*, 107 N.C. App. 102, 418 S.E.2d 526 (1992).

Applied in *Kinlaw v. North Carolina Farm Bureau Mut. Ins. Co.*, 98 N.C. App. 13, 389 S.E.2d 840 (1990).

§ 7A-320. Costs are exclusive.

CASE NOTES

Authority to Tax Costs under § 6-20. — Under § 7A-305, which specifies in subsection (d) the costs recoverable in civil actions, and also provides in subsection (e) that nothing in this section shall affect the liability of the respective parties for costs as provided by

law, the authority of trial courts to tax deposition expenses as costs pursuant to § 6-20 remains undisturbed, regardless of the language of § 7A-320. *Alsup v. Pitman*, 98 N.C. App. 389, 390 S.E.2d 750 (1990).

SUBCHAPTER VII. ADMINISTRATIVE MATTERS.

ARTICLE 29.

Administrative Office of the Courts.

§ 7A-340. Administrative Office of the Courts; establishment; officers.

Cross References. — As to authorization for the Legislative Services Commission and the Administrative Office of

the Courts to establish safety and health programs for their employees, see § 143-589.

§ 7A-343.1. Distribution of copies of the appellate division reports.

The Administrative Officer of the Courts shall, at the State's expense distribute such number of copies of the appellate division reports to federal, State departments and agencies, and to educational institutions of instruction, as follows:

Governor, Office of the	1
Lieutenant Governor, Office of the	1
Secretary of State, Department of the	2
State Auditor, Department of the	1
Treasurer, Department of the State	1
Superintendent of Public Instruction	1
Office of the Attorney General	11
State Bureau of Investigation	1
Agriculture, Department of	1
Labor, Department of	1
Insurance, Department of	1
Budget Bureau, Department of Administration	1
Property Control, Department of Administration	1
State Planning, Department of Administration	1
Board of Environment, Health, and Natural Resources	1
Revenue, Department of	1
Board of Human Resources	1
Commission for the Blind	1
Board of Transportation	1
Motor Vehicles, Division of	1
Utilities Commission	8
Industrial Commission	11
Office of Administrative Hearings	2
Community Colleges, Department of	38
Employment Security Commission	1
Commission of Correction	1
Parole Commission	1
Archives and History, Division of	1
Crime Control and Public Safety, Department of	2
Department of Cultural Resources	3
Legislative Building Library	2
Justices of the Supreme Court	1 ea.
Judges of the Court of Appeals	1 ea.
Judges of the Superior Court	1 ea.
Clerks of the Superior Court	1 ea.
District Attorneys	1 ea.
Emergency and Special Judges of the Superior Court	1 ea.
Supreme Court Library	AS MANY AS REQUESTED
Appellate Division Reporter	1
University of North Carolina, Chapel Hill	71
University of North Carolina, Charlotte	1
University of North Carolina, Greensboro	1
University of North Carolina, Asheville	1
North Carolina State University, Raleigh	1
Appalachian State University	1
East Carolina University	1
Fayetteville State University	1
North Carolina Central University	17

Western Carolina University	1
Duke University	17
Davidson College	2
Wake Forest University	25
Lenoir Rhyne College	1
Elon College	1
Campbell College	25
Federal, Out-of-State and Foreign	
Secretary of State	1
Secretary of Defense	1
Secretary of Health, Education and Welfare	1
Secretary of Housing and Urban Development	1
Secretary of Transportation	1
Attorney General	1
Department of Justice	1
Internal Revenue Service	1
Veterans' Administration	1
Library of Congress	5
Federal Judges resident in North Carolina	1 ea.
Marshal of the United States Supreme Court	1
Federal District Attorneys resident in North Carolina	1 ea.
Federal Clerks of Court resident in North Carolina	1 ea.
Supreme Court Library exchange list	1

Each justice of the Supreme Court and judge of the Court of Appeals shall receive for his private use, one complete and up-to-date set of the appellate division reports. The copies of reports furnished each justice or judge as set out in the table above may be retained by him personally to enable him to keep up-to-date his personal set of reports. (1977, c. 379, s. 2; c. 771, s. 4; 1979, c. 899, s. 1; 1979, 2nd Sess., c. 1278; 1985 (Reg. Sess., 1986), c. 1022, s. 2; 1987, c. 877, s. 1; 1989, c. 727, s. 218(1); 1993, c. 257, s. 19.)

Effect of Amendments. —

The 1993 amendment, effective July 1, 1993, added "State Auditor, Depart-

ment of the" to the list and allocated to that Department one copy of the appellate division reports.

§ 7A-344. Special duties of Director concerning representation of indigent persons.

In addition to the duties prescribed in G.S. 7A-343, the Director shall also:

- (1) Supervise and coordinate the operation of the laws and regulations concerning the assignment of legal counsel for indigent persons under Subchapter IX of this Chapter to the end that all indigent persons are adequately represented;
- (2) Advise and cooperate with the offices of the public defenders as needed to achieve maximum effectiveness in the discharge of the defender's responsibilities;
- (3) Collect data on the operation of the assigned counsel and the public defender systems, and make such recommendations to the General Assembly for improvement in the operation of these systems as appear to him to be appropriate; and
- (4) Accept and utilize federal or private funds, as available, to improve defense services for the indigent, including indi-

gent juveniles alleged to be delinquent or undisciplined. To facilitate processing of juvenile cases and civil cases in which a party is entitled to counsel, the administrative officer is further authorized, in any district or set of districts as defined in G.S. 7A-41.1(a), with the approval of the chief district court judge for cases in the district court division and the approval of the senior resident superior court judge for cases in the superior court division, to engage the services of a particular attorney or attorneys to provide specialized representation on a full-time or part-time basis. (1969, c. 1013, s. 4; 1975, c. 956, s. 12; 1987 (Reg. Sess., 1988), c. 1037, s. 26; 1993, c. 321, s. 192; c. 561, s. 79(a).)

Editor's Note. —

Session Laws 1993, c. 561, s. 23.1, as added by Session Laws 1994, Extra Session, c. 24, s. 54, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 1993-95 biennium, the textual provisions of this act shall apply only to funds appropriated for and activities occurring during the 1993-95 biennium."

Session Laws 1993, c. 561, which amended this section, in s. 79(b) provides:

"(b) The Director of the Administrative Office of the Courts may conduct a pilot program in up to six judicial districts selected by the Director with the approval of the senior resident superior court judge and the chief district court judge of each district. To facilitate the processing of all cases, the Director shall, in each pilot area, engage the services of a particular attorney or attorneys to provide specialized representation to indigent persons on a full-time or

part-time basis. The pilot program shall terminate on June 30, 1994, and the Administrative Office of the Courts shall provide a written evaluation of the pilot program to the North Carolina Courts Commission on or before October 1, 1994."

Effect of Amendments. —

Session Laws 1993, c. 321, s. 192, effective July 1, 1993, in subdivision (4), in the second sentence, inserted "and other indigent", substituted "district or set of districts as defined in G.S. 7A-41.1(a)" for "district court district" and inserted "for cases in the district court division and the approval of the senior resident superior court judge for cases in the superior court division".

Session Laws 1993, c. 561, s. 79(a), effective July 1, 1993, in this section as amended by Session Laws 1993, c. 321, s. 192, substituted "cases and civil cases in which a party is entitled to counsel" for "and other indigent cases" in the second sentence of subdivision (4).

§ 7A-345. Duties of assistant director.

CASE NOTES

Cited in *State v. Eley*, 326 N.C. 759, 392 S.E.2d 394 (1990).

§ 7A-346.1. Dispute Settlement Center Reports.

(a) All local dispute settlement centers currently receiving State funds shall report annually to the Judicial Department on the program's funding and activities, including:

- (1) Types of dispute settlement services provided;
- (2) Clients receiving each type of dispute settlement service;
- (3) Number and type of referrals received, cases actually mediated, cases resolved in mediation, and total clients served in the cases mediated;

- (4) Total program funding and funding sources;
- (5) Itemization of the use of funds, including operating expenses and personnel;
- (6) Itemization of the use of State funds;
- (7) Level of volunteer activity; and
- (8) Identification of future service demands and budget requirements.

The Judicial Department shall compile and summarize the information provided pursuant to this subsection and shall provide the information to the Chairs of the House and Senate Appropriations Committees and the Chairs of the House and Senate Appropriations Subcommittees on Justice and Public Safety by February 1 of each year.

(b) Each local dispute settlement center requesting State funds for the first time shall provide the General Assembly with (i) the information enumerated in subsection (a) of this section, or projections where historical data is not available, as well as a detailed statement justifying the need for State funding, and (ii) certification that at least fifty percent (50%) of total funding for the first fiscal year in which funding is requested shall come from non-State sources and, if funding is requested for a second fiscal year, certification that at least sixty percent (60%) of total funding for the second fiscal year shall come from non-State sources.

(c) Each local dispute settlement center requesting an expansion of State funding shall provide the General Assembly with (i) the information enumerated in subsection (a) of this section, or projections where historical data is not available, as well as a detailed statement justifying the need for the expansion of State funding, and (ii) certification that at least sixty percent (60%) of total funding shall come from non-State sources. (1993 (Reg. Sess., 1994), c. 769, s. 24.8A.)

Editor's Note. — Session Laws 1993 (Reg. Sess., 1994), c. 769, s. 24.8, was codified as this section at the direction of the Revisor of Statutes.

Session Laws 1993 (Reg. Sess., 1994), c. 777, s. 9(d), effective July 17, 1994, redesignated the second Section 24.8 of Session Laws 1993 (Reg. Sess., 1994), c. 769 as Section 24.8A.

Session Laws 1993 (Reg. Sess., 1994), c. 769, s. 2 provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 1994.'"

Session Laws 1993 (Reg. Sess., 1994), c. 769, s. 43.2 provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 1994-95 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 1994-95 fiscal year."

Session Laws 1993 (Reg. Sess., 1994), c. 769, s. 43.5 is a severability clause.

Session Laws 1993 (Reg. Sess., 1994), c. 769, s. 43.6 made this section effective July 1, 1994.

ARTICLE 30.

*Judicial Standards Commission.***§ 7A-376. Grounds for censure or removal.**

CASE NOTES

- I. General Consideration.
- II. Willful Misconduct.
- V. Censure and Removal.

I. GENERAL CONSIDERATION.**Resignation Did Not Deprive Judicial Standards Committee of Jurisdiction over Question of Misconduct.**

— Fact that judge who had entered a plea of guilty to charge of felony possession of cocaine and possession of drug paraphernalia and marijuana tendered his resignation from his judicial office did not deprive the Judicial Standards Commission or Supreme Court of jurisdiction over question of whether his conduct was in violation of this section, where prior to the tender of his resignation, the Commission had notified him that formal proceedings had been instituted against him, and he had been served personally with that notice and a copy of the verified complaint specifying the charges against him; the issues raised in this disciplinary proceeding did not become moot by reason of the tender of his resignation. In re Sherrill, 328 N.C. 719, 403 S.E.2d 255 (1991).

Applied in In re Cornelius, 335 N.C. 198, 436 S.E.2d 836 (1993).

II. WILLFUL MISCONDUCT.**Guilty Plea for Possession of Co-**

caine and Marijuana Held Willful Misconduct. — Judge's conduct resulting in his entering a plea of guilty to all charges concerning possession of cocaine, marijuana and drug paraphernalia constituted willful misconduct in office and conduct prejudicial to the administration of justice that brings the judicial office into disrepute, for which he should be removed and be disqualified from holding further judicial office and ineligible for retirement benefits. In re Sherrill, 328 N.C. 719, 403 S.E.2d 255 (1991).

V. CENSURE AND REMOVAL.

Censure Proper. — Evidence supported the Judicial Standards Commission's decision to censure judge who declared counsel, who initiated preliminary investigation of her before the Judicial Standards Commission, persona non grata, thereby constituting conduct in violation of Canons 2A and 3A(3) of the Code of Judicial Conduct and this section. In re Bissell, 333 N.C. 766, 429 S.E.2d 731 (1993).

§ 7A-377. Procedures; employment of executive secretary, special counsel or investigator.

(a) Any citizen of the State may file a written complaint with the Commission concerning the qualifications or conduct of any justice or judge of the General Court of Justice, and thereupon the Commission shall make such investigation as it deems necessary. The Commission may also make an investigation on its own motion. The Commission is authorized to issue process to compel the attendance of witnesses and the production of evidence, to administer oaths, to punish for contempt, and to prescribe its own rules of procedure. No justice or judge shall be recommended for censure or removal unless he has been given a hearing affording due process of law. Unless otherwise waived by the justice or judge involved, all

papers filed with and proceedings before the Commission, including any preliminary investigation which the Commission may make, are confidential, except as provided herein. After the preliminary investigation is completed, and if the Commission concludes that formal proceedings should be instituted, the notice and complaint filed by the Commission, along with the answer and all other pleadings, are not confidential. Formal hearings ordered by the Commission are not confidential, and recommendations of the Commission to the Supreme Court, along with the record filed in support of such recommendations are not confidential. Testimony and other evidence presented to the Commission is privileged in any action for defamation. At least five members of the Commission must concur in any recommendation to censure or remove any justice or judge. A respondent who is recommended for censure or removal is entitled to a copy of the proposed record to be filed with the Supreme Court, and if he has objections to it, to have the record settled by the Commission. He is also entitled to present a brief and to argue his case, in person and through counsel, to the Supreme Court. A majority of the members of the Supreme Court voting must concur in any order of censure or removal. The Supreme Court may approve the recommendation, remand for further proceedings, or reject the recommendation. A justice of the Supreme Court or a member of the Commission who is a judge is disqualified from acting in any case in which he is a respondent.

(b) The Commission is authorized to employ an executive secretary to assist it in carrying out its duties. For specific cases, the Commission may also employ special counsel or call upon the Attorney General to furnish counsel. For specific cases, the Commission may also employ an investigator or call upon the Director of the State Bureau of Investigation to furnish an investigator. While performing duties for the Commission such executive secretary, special counsel or investigator shall have authority throughout the State to serve subpoenas or other process issued by the Commission in the same manner and with the same effect as an officer authorized to serve process of the General Court of Justice. (1971, c. 590, s. 1; 1973, c. 808; 1989 (Reg. Sess., 1990), c. 995, s. 2.)

Effect of Amendments. — The 1989 (Reg. Sess., 1990) amendment, effective October 1, 1990, except that prior law applies to papers filed with the Commission prior to October 1, 1990, and proceedings before the Commission prior to October 1, 1990, in subsection (a), substituted the present fifth, sixth and seventh sentences for the former fifth and sixth sentences, which read: "All papers filed with and proceedings before the

Commission are confidential, unless the judge involved shall otherwise request. The recommendations of the Commission to the Supreme Court, and the record filed in support of the recommendations are not confidential"; and deleted the former eighth sentence, which read: "No other publication of such testimony or evidence is privileged, except that the record filed with the Supreme Court continues to be privileged."

CASE NOTES

A written minority recommendation filed with the Judicial Standards Commission by one or more of its members is not confidential and

should be filed with the State Supreme Court together with the Commission's recommendation. *In re Bissell*, 333 N.C. 766, 429 S.E.2d 731 (1993).

SUBCHAPTER IX. REPRESENTATION OF INDIGENT PERSONS.

ARTICLE 36.

Entitlement of Indigent Persons Generally.

§ 7A-450. Indigency; definition; entitlement; determination; change of status.

Editor's Note. — Session Laws 1989 (Reg. Sess., 1990), c. 1066, s. 123 creates the Special Capital Case Rehearing Fund, which shall be used to provide resentencing hearings, related appeals, and post-conviction hearings required by the decisions of the United States Supreme Court in *McKoy v. North Carolina*, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990), and of the Supreme Court of North Carolina upon the remand of that case, for the payment of attorneys' fees and related expenses for representation of indigent persons as specified in Subchapter IX of Chapter 7A, which Fund shall terminate when the Director of the Administrative Office of Courts certifies to the State Comptroller that all reasonably foreseeable resentencing hearings, related appeals, and post-conviction hearings have been substantially completed.

The Special Capital Case Rehearing Fund is continued by Session Laws 1993, c. 321, s. 188, effective July 1, 1993.

Session Laws 1989 (Reg. Sess., 1990), c. 1066, s. 149 provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 1990-91 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 1990-91 fiscal year."

Session Laws 1993, c. 321, s. 321, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 1993-95 biennium, the textual provisions of this act shall apply only to funds appropriated for and activities occurring during the 1993-95 biennium."

Legal Periodicals. —

For note, "The Right to Appointment of Counsel for the Indigent Civil Contemnor Facing Incarceration for Failure to Pay Child Support — *McBride v. McBride*," 16 Campbell L. Rev. 127 (1994).

CASE NOTES

- I. General Consideration.
- II. Appointment of Counsel.
- III. Appointment of Experts.

I. GENERAL CONSIDERATION.

Effect of Accepting Counsel Obtained by Family. — Where, during a pretrial proceeding, defendant explicitly accepted an attorney obtained by his family as counsel of his own choosing, from this point on in the pretrial proceeding defendant was not an indigent within the meaning of subsection (a) of this section, as he had, through his family, secured private representation, and therefore he was not entitled to the appointment of assistant counsel. *State v. McDowell*, 329 N.C. 363, 407 S.E.2d 200 (1991).

Hiring Counsel Does Not Preclude Access to Funds for Other Purposes.

— That defendant had sufficient resources to hire counsel does not in itself foreclose defendant's access to state funds for other necessary expenses of representation — including expert witnesses — if, in fact, defendant does not have sufficient funds to defray these expenses when the need for them arises. *State v. Boyd*, 332 N.C. 101, 418 S.E.2d 471 (1992).

Applied in *State v. Seaberry*, 97 N.C. App. 203, 388 S.E.2d 184 (1990); *State v. Taylor*, 327 N.C. 147, 393 S.E.2d 801

(1990); *State v. Tucker*, 329 N.C. 709, 407 S.E.2d 805 (1991).

Stated in *State v. Allen*, 112 N.C. App. 419, 435 S.E.2d 802 (1993).

Cited in *State v. Phipps*, 331 N.C. 427, 418 S.E.2d 178 (1992); *State v. Boyd*, 332 N.C. 101, 418 S.E.2d 471 (1992); *State v. Conner*, 335 N.C. 618, 440 S.E.2d 826 (1994).

II. APPOINTMENT OF COUNSEL.

Failure to make timely appointment as prejudicial error. —

In accord with the main volume. See *State v. Brown*, 325 N.C. 427, 383 S.E.2d 910 (1989).

III. APPOINTMENT OF EXPERTS.

When Right to Investigator Arises. —

Where, in his motion for the hiring of a private investigator, the defendant alleged that the district attorney fur-

nished him with information that there appeared to be a number of suspects in the initial investigation of the case, and at the hearing the defendant introduced a police report that an automobile which was not the vehicle he was driving was seen "speeding away" from the crime scene, this evidence arose only to the level of mere hope or suspicion that favorable evidence was available; thus, trial court did not err in denying defendant funds for a private investigator. *State v. Barnes*, 333 N.C. 666, 430 S.E.2d 223 (1993).

Trial court's authorization of \$250 for employment of an expert witness in the field of textile science, rather than the \$500 which defendant in capital murder case had sought, did not constitute error where, in any event, defendant failed to make the requisite showing of specific need for any more funds. *State v. Coffey*, 326 N.C. 268, 389 S.E.2d 48 (1990).

§ 7A-450.1. Responsibility for payment by certain fiduciaries.

It is the intent of the General Assembly that, whenever possible, if an attorney or guardian ad litem is appointed pursuant to G.S. 7A-451 for a person who is less than 18 years old or who is at least 18 years old but remains dependent on and domiciled with a parent or guardian, the parent, guardian, or any trustee in possession of funds or property for the benefit of the person, shall reimburse the State for the attorney or guardian ad litem fees, pursuant to the procedures established in G.S. 7A-450.2 and G.S. 7A-450.3. This section shall not apply in any case in which the person for whom an attorney or guardian ad litem is appointed prevails. (1983, c. 726, s. 1; 1991 (Reg. Sess., 1992), c. 1030, s. 2.)

Effect of Amendments. — The 1991 (Reg. Sess., 1992) amendment, effective

July 24, 1992, inserted "of" preceding "the person" in the first sentence.

§ 7A-450.3. Determination of responsibility at hearing.

Editor's Note. — Session Laws 1989 (Reg. Sess., 1990), c. 946, s. 4 provides: "Not later than October 1, 1991, the Administrative Office of the Courts shall submit to the Department of Revenue pursuant to Chapter 105A of the General Statutes, a list of all debts as defined in G.S. 105A-2(3) which are owed to the State by any debtor on a judgment docketed on or after October 1, 1981, un-

der G.S. 7A-455(b) or G.S. 7A-450.3 for the value of services rendered and expenses incurred in providing representation to an indigent, juvenile or dependent adult, and for which the information required by G.S. 105A-3(c) and G.S. 105A-6(a), is available in the records of the clerk of superior court."

§ 7A-451. Scope of entitlement.

Legal Periodicals. —

For note, "The Right to Appointment of Counsel for the Indigent Civil Contemnor Facing Incarceration for Failure

to Pay Child Support — McBride v. McBride," 16 Campbell L. Rev. 127 (1994).

CASE NOTES

- I. General Consideration.
- II. Right to Counsel in Particular Actions.

I. GENERAL CONSIDERATION.

Stated in *State v. Taylor*, 327 N.C. 147, 393 S.E.2d 801 (1990).

II. RIGHT TO COUNSEL IN PARTICULAR ACTIONS.

Contempt for Noncompliance with Support Order. — Subdivision (a)(1) of

this section requires appointment of counsel in "any case in which imprisonment ... is likely to be adjudged," and that includes citations for criminal contempt for failure to comply with civil child support orders. *Hammock v. Bencini*, 98 N.C. App. 510, 391 S.E.2d 210 (1990).

§ 7A-451.1. Counsel fees for outpatient involuntary commitment proceedings.

The State shall pay counsel fees for persons appointed pursuant to G.S. 122C-267(d). (1983, c. 638, s. 24; c. 864, s. 4; 1985, c. 589, s. 4; 1991, c. 761, s. 3.)

Effect of Amendments. — The 1991 amendment, effective July 16, 1991,

substituted "G.S. 122C-267(d)" for "G.S. 122-58.7A:1."

§ 7A-454. Supporting services.

CASE NOTES

When Fingerprint Expert Must Be Appointed. — While it is within the trial court's discretion to approve a fee for the appointment of an expert witness to testify for an indigent defendant under this section, it is error of constitutional magnitude to refuse such funds when the defendant has made a threshold showing of specific need and when expert assistance is of material importance to his defense or when its absence would deprive him of a fair trial. These requisites are met when it is apparent that fingerprint evidence is crucial to the State's attempt to prove that defendant was the perpetrator of the charged offense and when denial of a motion for funds precludes an indigent defendant from seeking the assistance of an independent expert in assessing that evidence. *State v. Bridges*, 325 N.C. 529, 385 S.E.2d 337 (1989).

Defendant made the requisite threshold showing, etc. —

Where without his own expert to examine items found at the scene of the crime, defendant could not adequately assess State experts' conclusions that latent prints found at the scene were his, and fingerprint evidence was the only direct evidence linking defendant to the offense, defendant made a threshold showing of specific need and demonstrated that such testimony would be of material assistance in preparing his defense. *State v. Bridges*, 325 N.C. 529, 385 S.E.2d 337 (1989).

Denial of Motion for DNA Expert Upheld. — Notwithstanding any failure to show a particularized need at the time of his motion for the DNA expert, defendant, at oral argument, contended that such need became evident during the

course of the trial. However, defendant did not renew his motion for appointment of a DNA expert, nor did he call to the court's attention specific circumstances showing a particularized need; therefore, the trial court did not err in denying defendant's motion. *State v. Mills*, 332 N.C. 392, 420 S.E.2d 114 (1992).

Applied in *State v. Seaberry*, 97 N.C. App. 203, 388 S.E.2d 184 (1990); *State v. Taylor*, 327 N.C. 147, 393 S.E.2d 801 (1990); *State v. Tucker*, 329 N.C. 709, 407 S.E.2d 805 (1991).

Cited in *State v. Phipps*, 331 N.C. 427, 418 S.E.2d 178 (1992).

§ 7A-455. Partial indigency; liens; acquittals.

(a) If, in the opinion of the court, an indigent person is financially able to pay a portion, but not all, of the value of the legal services rendered for him by assigned counsel, the public defender, or the appellate defender, and other necessary expenses of representation, he shall order the partially indigent person to pay such portion to the clerk of superior court for transmission to the State treasury.

(b) In all cases the court shall fix the money value of services rendered by assigned counsel, the public defender, or the appellate defender, and such sum plus any sums allowed by the court for other necessary expenses of representing the indigent person, including any fees and expenses that may have been allowed prior to final determination of the action to assigned counsel pursuant to G.S. 7A-458, shall be entered as a judgment in the office of the clerk of superior court, and shall constitute a lien as prescribed by the general law of the State applicable to judgments. Any reimbursement to the State as provided in subsection (a) of this section or any funds collected by reason of such judgment shall be deposited in the State treasury and credited against the judgment; provided, that counsel fees ordered paid to the clerk on behalf of the appointed counsel pursuant to G.S. 15A-1343(e) may be paid directly to the counsel. In fixing the money value of services rendered by the public defender and the appellate defender, the court shall consider the factors normally involved in fixing the fees of private attorneys, such as the nature of the case, the time, effort, and responsibility involved, and the fee usually charged in similar cases. The value of the services shall be fixed by a district court judge for actions or proceedings finally determined in the district court and by a superior court judge for actions or proceedings originating in, heard on appeal in, or appealed from the superior court. Even if the trial, appeal, hearing, or other proceeding is never held, preparation therefor is nevertheless compensable.

(c) No order for partial payment under subsection (a) of this section and no judgment under subsection (b) of this section shall be entered unless the indigent person is convicted. If the indigent person is convicted, the order or judgment shall become effective and the judgment shall be docketed and indexed pursuant to G.S. 1-233 et seq., in the amount then owing, upon the later of (i) the date upon which the conviction becomes final if the indigent person is not ordered, as a condition of probation, to pay the State of North Carolina for the costs of his representation in the case or (ii) the date upon which the indigent person's probation is terminated or revoked if the indigent person is so ordered.

(d) In all cases in which the entry of a judgment is authorized under G.S. 7A-450.1 through G.S. 7A-450.4 or under this section, the attorney, guardian ad litem, public defender, or appellate defender who rendered the services or incurred the expenses for which the judgment is to be entered shall obtain the social security number, if any, of each person against whom judgment is to be entered. This number, or a certificate that the person has no social security number, shall be included in each fee application submitted by an assigned attorney, guardian ad litem, public defender, or appellate defender, and no order for payment entered upon an application which does not include the required social security number or certification shall be valid to authorize payment to the applicant from the Indigent Persons' Attorney Fee Fund. Each judgment docketed against any person under this section or under G.S. 7A-450.3 shall include the social security number, if any, of the judgment debtor. (1969, c. 1013, s. 1; 1983, c. 135, s. 2; 1983 (Reg. Sess., 1984), c. 1109, s. 12; 1985, c. 474, s. 9; 1989 (Reg. Sess., 1990), c. 946, ss. 5, 6; 1991, c. 761, s. 4; 1991 (Reg. Sess., 1992), c. 900, s. 116(a).)

Editor's Note. — Session Laws 1989 (Reg. Sess., 1990), c. 946, s. 4 provides: "Not later than October 1, 1991, the Administrative Office of the Courts shall submit to the Department of Revenue pursuant to Chapter 105A of the General Statutes, a list of all debts as defined in G.S. 105A-2(3) which are owed to the State by any debtor on a judgment docketed on or after October 1, 1981, under G.S. 7A-455(b) or G.S. 7A-450.3 for the value of services rendered and expenses incurred in providing representation to an indigent, juvenile or dependent adult, and for which the information required by G.S. 105A-3(c) and G.S. 105A-6(a), is available in the records of the clerk of superior court."

Session Laws 1991 (Reg. Sess., 1992), c. 900, s. 2, provides: "This act shall be known as 'The Current Operations Appropriations Act of 1992.'"

Session Laws 1991 (Reg. Sess., 1992), c. 900, s. 182 is a severability clause.

Effect of Amendments. — Session Laws 1989 (Reg. Sess., 1990), c. 946, s. 5,

effective July 1, 1990, and applicable to all applications submitted and orders entered on or after October 1, 1990, added subsection (d).

Session Laws 1989 (Reg. Sess., 1990), c. 946, s. 6, effective July 1, 1990, and applicable to all judgments entered on or after October 1, 1990, substituted the present version of subsection (c) for the former, which read: "If the indigent person is not finally convicted, the foregoing provisions with respect to partial payments and liens shall not be applicable."

The 1991 amendment, effective July 16, 1991, substituted "G.S. 7A-450.3" for "G.S. 450.3" in the last sentence of subsection (d).

The 1991 (Reg. Sess., 1992) amendment, effective July 1, 1992, inserted "including any fees and expenses that may have been allowed prior to final determination of the action to assigned counsel pursuant to G.S. 7A-458" in the first sentence of subsection (b).

CASE NOTES

Cited in *State v. Boyd*, 332 N.C. 101, 418 S.E.2d 471 (1992).

§ 7A-456. False statements; penalty.

(a) A false material statement made by a person under oath or affirmation in regard to the question of his indigency constitutes a Class I felony.

(b) A judicial official making the determination of indigency shall notify the person of the provisions of subsection (a) of this section.

(c) Repealed by Session Laws 1987 (Reg. Sess., 1988), c. 1100, s. 11.1. (1969, c. 1013, s. 1; 1987 (Reg. Sess., 1988), c. 1086, s. 113(c); c. 1100, s. 11.1; 1993 (Reg. Sess., 1994), c. 767, s. 19.)

Editor's Note. —

Session Laws 1993 (Reg. Sess., 1994), c. 767, which amended this section, in s. 34 provides: "Prosecution for, or sentences based on, offenses occurring before the effective date of this act are not abated or affected by the repeal or amendment in this act of any statute, and the statutes that would be applicable to those prosecutions or sentences but for the provisions of this act remain applicable to those prosecutions or sentences."

Effect of Amendments. —

The 1993 (Reg. Sess., 1994) amendment, effective October 1, 1994, substituted "a Class I felony" for "perjury, and upon conviction thereof, the defendant may be punished as provided in G.S. 14-209" in subsection (a); and deleted "and shall explain to him the meaning of and the consequences of committing the crime of perjury" in subsection (b).

§ 7A-457. Waiver of counsel; pleas of guilty.

CASE NOTES

II. Waiver of Counsel.

A. In General.

II. WAIVER OF COUNSEL.

A. In General.

And waiver of counsel may not be

presumed from a silent record. —

In accord with the main volume. See *State v. Brown*, 325 N.C. 427, 383 S.E.2d 910 (1989).

§ 7A-458. Counsel fees.

In districts which do not have a public defender, the court shall fix the fee to which an attorney who represents an indigent person is entitled. In doing so, the court shall allow a fee based on the factors normally considered in fixing attorneys' fees, such as the nature of the case, and the time, effort and responsibility involved. Fees shall be fixed by the district court judge who hears the case for actions or proceedings finally determined in the district court and by the superior court judge who hears the case for actions or proceedings originating in, heard on appeal in, or appealed from the superior court. Even if the trial, appeal, hearing or other proceeding is never held, preparation therefor is nevertheless compensable and, in capital cases and other extraordinary cases pending in superior court, the presiding judge may allow a fee for services rendered and payment for expenses incurred pending final determination of the case. (1969, c. 1013, s. 1; 1987 (Reg. Sess., 1988), c. 1086, s. 113(b); 1991 (Reg. Sess., 1992), c. 900, s. 116(b).)

Editor's Note. —

Session Laws 1991 (Reg. Sess., 1992), c. 900, s. 2, provides: "This act shall be known as 'The Current Operations Appropriations Act of 1992.'"

Session Laws 1991 (Reg. Sess., 1992), c. 900, s. 182 is a severability clause.

Effect of Amendments. —

The 1991 (Reg. Sess., 1992) amendment, effective July 1, 1992, added the language beginning "and, in capital cases and other" in the last sentence.

§ 7A-459. Implementing regulations by State Bar Council.

The North Carolina State Bar Council shall make rules and regulations consistent with this Article relating to the manner and method of assigning counsel, the procedure for the determination of indigency, the waiver of counsel, the adoption and approval of plans by any district bar as defined in G.S. 84-19 regarding the method of assignment of counsel among the licensed attorneys of the district bar district, and such other matters as shall provide for the protection of the constitutional rights of all indigent persons and the reasonable allocation of responsibility for the representation of indigent persons among the licensed attorneys of this State. These rules and regulations shall apply in every county and shall not become effective until certified to and approved by the Supreme Court of North Carolina. (1969, c. 1013, s. 1; 1987 (Reg. Sess., 1988), c. 1037, s. 31; 1991, c. 304, s. 1.)

Effect of Amendments. —

The 1991 amendment, effective October 1, 1991, deleted "In counties which do not have a public defender" at the beginning of the first sentence and sub-

stituted "These rules and regulations shall apply in every county and" for "Such rules and regulations" in the second sentence.

CASE NOTES

Division of labor. — Defendant's contention that the division of labor between attorney and assistant counsel demonstrated that attorney's status as lead counsel was purely nominal and, as a result, defendant was deprived of his

right to be represented by a lead counsel with five years experience in the general practice of law was without merit. *State v. Howell*, 335 N.C. 457, 439 S.E.2d 116 (1994).

ARTICLE 37.

The Public Defender.

§ 7A-465. Public defender; defender districts; qualifications; compensation.

(a) The following counties of the State are organized into the defender districts listed below and in each of those defender districts an office of public defender is established:

*Defender
District**Counties*

3A	Pitt
3B	Carteret
12	Cumberland
14	Durham
15B	Orange, Chatham
16A	Scotland, Hoke
16B	Robeson
18	Guilford
26	Mecklenburg
27A	Gaston
28	Buncombe

Provided that the effective date of the establishment of the office of public defender in Defender District 16B shall be the date that a superior court judge for Superior Court District 16B, other than the judge holding the judgeship for that district established by Chapter 509, Session Laws of 1987, takes office.

(a) The public defender for each of the above defender districts shall represent indigents and otherwise perform all other duties of a public defender in the district and superior courts of the counties included in his defender district.

(b) The public defender shall be an attorney licensed to practice law in North Carolina, and shall devote his full time to the duties of his office.

In lieu of merit and other increment raises paid to regular State employees, a public defender shall receive as longevity pay an amount equal to four and eight-tenths percent (4.8%) of the annual salary set forth in the Current Operations Appropriations Act payable monthly after five years of service, nine and six-tenths percent (9.6%) after 10 years of service, fourteen and four-tenths percent (14.4%) after 15 years of service, and nineteen and two-tenths percent (19.2%) after 20 years of service. "Service" means service as a public defender. (1969, c. 1013, s. 1; 1973, c. 47, s. 2; c. 799, s. 1; 1975, c. 956, s. 14; 1977, c. 802, s. 41.2; c. 1130, s. 6; 1977, 2nd Sess., c. 1219, s. 43.3; 1979, 2nd Sess., c. 1284, s. 1; 1981 (Reg. Sess., 1982), c. 1282, s. 72; 1983 (Reg. Sess., 1984), c. 1034, s. 94; 1987, c. 738, s. 35; 1987 (Reg. Sess., 1988), c. 1056, ss. 8, 9; 1989 (Reg. Sess., 1990), c. 1066, s. 127(b).)

Editor's Note. — Session Laws 1989 (Reg. Sess., 1990), c. 1066, which amended this section, provided in s. 2: "This act shall be known as 'The Current Operations Appropriations Act of 1990.'"

Session Laws 1989 (Reg. Sess., 1990), c. 1066, s. 154 provided: "Except as otherwise provided, this act shall become effective July 1, 1990."

Session Laws 1989 (Reg. Sess., 1990), c. 1066, s. 153 is a severability clause.

Effect of Amendments. —

The 1989 (Reg. Sess., 1990) amendment deleted "effective January 1, 1989" following "established" in the introductory paragraph of subsection (a), and inserted an entry for Durham in the list in that subsection.

§ 7A-466. Term of defender; selection; removal.

(a) Except as provided in subsection (b) of this section, the term of office of each public defender is for four years, beginning on the date specified in subsection (b) or (c) of this section, and quadrennially thereafter.

(b) The public defender for each of the judicial districts listed below, as constituted on December 31, 1988, who is in office on that date, shall become the public defender for the defender district listed opposite that judicial district. The term of each such defender shall end on the date indicated and a new term shall begin on the following day.

<i>Judicial District as of 12/31/88</i>	<i>Defender District</i>	<i>Term Ends</i>
12	12	December 31, 1989
15B	15B	May 31, 1991
18	18	June 30, 1991
26	26	June 30, 1991
27A	27A	June 30, 1991
28	28	June 30, 1989.

(c) The terms of the public defenders for Defender Districts 3A, 3B, and 16A shall begin on January 1, 1989. The term of the public defender for Defender District 16B shall begin upon the appointment of the initial public defender for that district. The term of the public defender for Defender District 14 shall begin on July 1, 1990.

(d) Except in Defender District 16B, for each new term beginning on or after January 1, 1989, and to fill any vacancy, the public defender for a defender district shall be appointed from a list of not less than two and not more than three names nominated by written ballot of the attorneys resident in the defender district who are licensed to practice law in North Carolina. The balloting shall be conducted pursuant to regulations promulgated by the Administrative Office of the Courts. The appointment shall be made by the senior resident superior court judge of the superior court district or set of districts as defined in G.S. 7A-44.1 which includes the county or counties of the defender district for which the public defender is being appointed.

(e) In Defender District 16B, for each new term beginning on or after January 1, 1989, and to fill any vacancy, the public defender for a defender district shall be appointed from a list of not less than three names nominated by written ballot of the attorneys resident in the defender district who are licensed to practice law in North Carolina. The balloting shall be conducted pursuant to regulations promulgated by the Administrative Office of the Courts. The appointment shall be made by the resident superior court judge of Superior Court District 16B other than the senior resident superior court judge.

(f) A public defender or assistant public defender may be suspended or removed from office, and reinstated, for the same causes and under the same procedures as are applicable to removal of a district attorney. (1969, c. 1013, s. 1; 1973, c. 47, s. 2; c. 148, s. 5; c. 799, s. 2; 1975, c. 956, ss. 15, 16; 1977, c. 1130, s. 7; 1979, 2nd Sess.,

c. 1284, s. 2; 1981 (Reg. Sess., 1982), c. 1282, s. 73; 1985, c. 698, s. 22.1; 1987 (Reg. Sess., 1988), c. 1056, s. 10; 1989 (Reg. Sess., 1990), c. 1066, s. 127(c); c. 1074, s. 16(b).)

Editor's Note. — Session Laws 1989 (Reg. Sess., 1990), c. 1074, s. 16(b), effective July 1, 1990, but expiring on December 31, 1990, amended subsection (d) by increasing the number of names from which an appointee for a public defender should be chosen. Subsection (d) as in effect from July 1, 1990, until December 31, 1990, read:

"(d) Except in Defender District 16B, for each new term beginning on or after January 1, 1989, and to fill any vacancy, the public defender for a defender district shall be appointed from a list of not less than three and not more than five names nominated by written ballot of the attorneys resident in the defender district who are licensed to practice law in North Carolina. The balloting shall be conducted pursuant to regulations promulgated by the Administrative Office of the Courts. The appointment shall be made by the senior resident superior court judge of the superior court district or set of districts as defined in G.S. 7A-44.1 which includes the county or counties of the defender district for which the public defender is being appointed."

Session Laws 1989 (Reg. Sess., 1990), c. 1066, s. 127(c) provided: "Effective

July 1, G.S. 7A-466(c) reads as rewritten: '(c) The terms of the public defenders for Defender Districts 3A, 3B, and 16A shall begin on January 1, 1989. The term of the public defender for defender district 16B shall begin upon the appointment of the initial public defender for that district. The term of the public defender for Defender District 14 shall begin on July 1, 1990.'" Subsection (c) is set out above as amended by c. 1066, s. 127(c).

Session Laws 1989 (Reg. Sess., 1990), c. 1066, s. 154 provided: "Except as otherwise provided, this act shall become effective July 1, 1990."

Session Laws 1989 (Reg. Sess., 1990), c. 1066, s. 2 provided: "This act shall be known as 'The Current Operations Appropriations Act of 1990'."

Session Laws 1989 (Reg. Sess., 1990), c. 1074, s. 1 provided: "This act shall be known as the 'Capital Improvement Appropriations Act of 1990'."

Session Laws 1989 (Reg. Sess., 1990), c. 1066, s. 153 is a severability clause.

Effect of Amendments. —

The 1989 (Reg. Sess., 1990) amendment by c. 1066, s. 127(c) added the last sentence in subsection (c).

CASE NOTES

Cited in *Republican Party v. Martin*, 980 F.2d 943 (4th Cir. 1992).

§ 7A-467. Assistant defenders; assigned counsel.

(a) Each public defender is entitled to such assistant public defenders and investigators, full-time or part-time, as may be authorized by the Administrative Office of the Courts. Assistants and investigators are appointed by the public defender and serve at his pleasure. Compensation of assistants shall be as provided in the biennial Current Operations Appropriations Act. The Administrative Officer of the Courts shall fix the compensation of each investigator. Assistants and investigators shall perform such duties as may be assigned by the public defender.

(b) A member of the district bar of any judicial district as defined in G.S. 84-19, all or part of which includes or is included in a defender district, who resides or regularly practices in that district and who consents to such service may be assigned by the public defender to represent an indigent person. In addition, if a conflict of interests prohibits the public defender from representing an indigent person, or in unusual circumstances when, in the opinion of

the court the proper administration of justice requires it, the court may assign a member of the district bar to represent an indigent person. All assignments made under this subsection shall be governed by the rules and regulations made by the North Carolina State Bar Council pursuant to G.S. 7A-459. Any attorney assigned under this subsection is entitled to the services of the defender's office to the same extent as counsel assigned by the public defender.

(c) In assigning assistant defenders and members of the bar generally the defender shall consider the nature of the case and the skill of counsel, to the end that all indigent persons are adequately represented. Any attorney assigned shall have the minimum experience and qualifications required by the rules and regulations made by the North Carolina State Bar Council pursuant to G.S. 7A-459. Members of the bar assigned by the defender or by the court are compensated in the same manner as assigned counsel are compensated in districts which do not have a public defender.

(d) In lieu of merit and other increment raises paid to regular State employees, an assistant public defender shall receive as longevity pay an amount equal to four and eight-tenths percent (4.8%) of the annual salary set forth in the Current Operations Appropriations Act payable monthly after five years of service, nine and six-tenths percent (9.6%) after 10 years of service, and fourteen and four-tenths percent (14.4%) after 15 years of service. "Service" means service as an assistant public defender. (1969, c. 1013, s. 1; 1983 (Reg. Sess., 1984), c. 1034, ss. 93, 165; 1987, c. 738, s. 33(b); 1987 (Reg. Sess., 1988), c. 1056, s. 11; 1991, c. 304, s. 2.)

Effect of Amendments. —

The 1991 amendment, effective October 1, 1991, in subsection (b) substituted "a" for "any" preceding "member of the

district bar" in the second sentence and added the third sentence, and added the second sentence of subsection (c).

ARTICLE 37A.

Access to Civil Justice Act.

§ 7A-474.2. Definitions.

The following definitions shall apply throughout this Article, unless the context otherwise requires:

- (1) "Eligible client" means a resident of North Carolina financially eligible for representation under the Legal Services Corporation Act, regulations, and interpretations adopted thereunder (45 CFR § 1611, and subsequent revisions).
- (2) "Legal assistance" means the provision of any legal services, as defined by Chapter 84 of the General Statutes, consistent with this Article. Provided, that all legal services provided hereunder shall be performed consistently with the Rules of Professional Conduct promulgated by the North Carolina State Bar. Provided, further, that no funds appropriated under this Article shall be used for lobbying to influence the passage or defeat of any legislation before any municipal, county, state, or national legislative body.
- (3) "Legal Services of North Carolina, Inc.," means the not-for-profit corporation established by the North Carolina Bar Association to administer the system of local legal services

programs primarily funded under the Legal Services Corporation Act (42 U.S.C. § 2996 et seq.) and the interest on Lawyer's Trust Accounts program of the North Carolina State Bar.

- (4) "Geographically based field programs" means the 15 local not-for-profit corporations supported by funds from Legal Services of North Carolina, Inc., and the Legal Services Corporation and which provide civil legal services to low-income residents of geographic service areas comprising all 100 counties in North Carolina. (1989, c. 795, s. 25.)

Editor's Note. — The section above is set out to correct a typographical error in subdivision (4) in the main volume.

ARTICLE 38A.

Appellate Defender Office.

§ 7A-486.3. Duties.

The appellate defender shall:

- (1) Represent indigent persons subsequent to conviction in trial courts pursuant to assignment by trial court judges under the general supervision of the Chief Justice of the Supreme Court. The Chief Justice may, following consultation with the appellate defender and consistent with the resources available to the appellate defender to ensure quality criminal defense services by the appellate defender's office, authorize the appellate defender not to accept assignments of certain appeals but instead to cause those appeals to be assigned either to a local public defender's office or to private assigned counsel.
- (2) Maintain a clearinghouse of materials and a repository of briefs prepared by the appellate defender to be made available to private counsel representing indigents in criminal cases.
- (3) Provide continuing legal education training to assistant appellate defenders and to private counsel representing indigents in criminal cases, including capital cases, as resources are available.
- (4) Provide consulting services to attorneys representing defendants in capital cases.
- (5) Recruit qualified members of the private bar who are willing to provide representation in State and federal death penalty postconviction proceedings.
- (6) In his discretion, serve as counsel of record for indigent defendants in capital cases in State court.
- (7) Undertake direct representation and consultation in capital cases pending in federal court only to the extent that such work is fully federally funded. (1985, c. 698, s. 20(a); 1991, c. 689, s. 82(c).)

Editor's Note. — Session Laws 1991, c. 689, which amended this section, in s. 82(b) provides: "No Lobbying by Appellate Defender's Office. The Appellate Defender's Office shall not lobby any entity, organization, or legislative body to urge either abolition or retention of the death penalty. If the Appellate Defender's Office or any of its employees fails to comply with this section or with any of the duties of the Appellate Defender's Office related to death penalty cases, the Director of the Administrative Office of the Courts may refuse to seek continued State funding for that part of the Appellate Defender's Office devoted to death penalty cases, or take such other actions as the Director considers appropriate."

Section 352 of Session Laws 1991, c. 689 provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 1991-93 biennium, the textual provisions of Titles I, II, and III of this act shall apply only to funds appropriated for and activities occurring during the 1991-93 biennium."

Session Laws 1991, c. 689, s. 353 is a severability clause.

Effect of Amendments. — The 1991 amendment, effective July 1, 1991, in subdivision (2), inserted "a clearinghouse of materials and"; in subdivision (3), inserted "including capital cases"; and added subdivisions (4) through (7).

ARTICLE 39A.

Custody and Visitation Mediation Program.

§ 7A-494. Custody and Visitation Mediation Program established.

Editor's Note. —

Session Laws 1991, c. 742, s. 10 provides: "From funds appropriated to the Judicial Department in the certified budget for the 1991-92 fiscal year, the Administrative Office of the Courts may transfer up to \$75,000 to implement nonbinding arbitration procedures in additional counties and judicial districts pursuant to G.S. 7A-37.1 and to establish local custody and visitation mediation programs in additional counties pursuant to G.S. 7A-494."

Session Laws 1991 (Reg. Sess., 1992), c. 900, s. 114 provides: "From funds appropriated to the Judicial Department in the certified budget for the 1992-93 fiscal year, the Administrative Office of the Courts may transfer within its bud-

get up to seventy-five thousand dollars (\$75,000) to implement nonbinding arbitration procedures in additional counties and judicial districts pursuant to G.S. 7A-37.1 and to establish local custody mediation and visitation programs in additional counties pursuant to G.S. 7A-494."

Session Laws 1993, c. 253, s. 6, from June 30, 1993 to August 1, 1993 provided that the Administrative Office of the Courts could transfer within its budget, from funds appropriated to the Judicial Department in the certified budget for the 1992-93 fiscal year, funds to continue nonbinding arbitration procedures pursuant to G.S. 7A-37.1 and local custody mediation and visitation programs pursuant to G.S. 7A-494.

SUBCHAPTER X. NORTH CAROLINA COURTS COMMISSION.

ARTICLE 40A.

North Carolina Courts Commission.

§ 7A-506. Creation; members; terms; qualifications; vacancies.

(a) The North Carolina Courts Commission is created. Effective July 1, 1993, it shall consist of 24 members, six to be appointed by the Governor, six to be appointed by the Speaker of the House of Representatives, six to be appointed by the President Pro Tempore of the Senate, and six to be appointed by the Chief Justice of the Supreme Court.

(b) Of the appointees of the Chief Justice of the Supreme Court, one shall be a Justice of the Supreme Court, one shall be a Judge of the Court of Appeals, two shall be judges of superior court, and two shall be district court judges.

(c) Of the six appointees of the Governor, one shall be a district attorney, one shall be a practicing attorney, one shall be a clerk of superior court, at least three shall be members of the General Assembly, and at least one shall not be an attorney.

(d) Of the six appointees of the Speaker of the House, at least three shall be practicing attorneys, at least three shall be members of the General Assembly, and at least one shall not be an attorney.

(e) Of the six appointees of the President Pro Tempore of the Senate, at least three shall be practicing attorneys, at least three shall be members of the General Assembly, and at least one shall be a magistrate.

(f) Of the initial appointments of each appointing authority, three shall be appointed for four-year terms to begin July 1, 1993, and three shall be appointed for two-year terms to begin July 1, 1993. Successors shall be appointed for four-year terms.

(g) A vacancy in membership shall be filled for the remainder of the unexpired term by the appointing authority who made the original appointment. A member whose term expires may be reappointed. (1979, c. 1077, s. 1; 1981, c. 847; 1981 (Reg. Sess., 1982), c. 1253, s. 4; 1983, c. 181, ss. 1, 2; c. 774, s. 2; 1991, c. 739, s. 7; 1993, c. 438, s. 1.)

Editor's Note. — Session Laws 1991, c. 739, which amended this section, in s. 34 provides: "This act applies to any appointments for terms beginning on or after January 1, 1993, and also applies to the filling of any unexpired terms where the term began before that date but the vacancy occurs on or after that date." See the "Effect of Amendments" notes.

Effect of Amendments. — The 1991 amendment, applicable to any appointments for terms beginning on or after January 1, 1993, and to the filling of un-

expired terms where the vacancy is on or after that date, inserted "Pro Tempore" in the second sentence of subsection (a), and in subsection (e).

The 1993 amendment, effective July 1, 1993, and applicable to appointments made on or after that date, in subsection (a) and twice in subsection (f) substituted "1993" for "1983" and in subsections (c), (d) and (e) deleted "or former members" preceding "of the General Assembly".

§ 7A-508. Duties.

Editor's Note. —

Session Laws 1994, Extra Session, c. 24, s. 51 provides that the North Carolina Courts Commission shall study whether to expand the jurisdiction of magistrates to allow them to dispose of infractions, facilitate the procedure for disposing of infractions, and allow magistrates to dispose of all Level I misdemeanors according to plea agreements. It further provides that the Commission shall make a final report to the 1995 Regular Session of the General Assembly no later than its convening.

Session Laws 1994, Extra Session, c. 24, s. 52 provides that the North Caro-

lina Courts Commission shall study whether to provide concurrent jurisdiction between the district and superior courts for the disposition of certain felonies. It further provides that the Commission shall make a final report to the 1995 Regular Session of the General Assembly no later than its convening.

Session Laws 1994, Extra Session, c. 24, s. 70, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 1993-95 biennium, the textual provisions of this act shall apply only to funds appropriated for and activities occurring during the 1993-95 biennium."

§ 7A-509. Chair; meetings; compensation of members.

The Governor, after consultation with the Chief Justice of the Supreme Court, shall appoint a chair from the legislative members of the Commission. The term of the chair is two years, and the chair may be reappointed. The Commission shall meet at such times and places as the chair shall designate. The facilities of the State Legislative Building shall be available to the Commission, subject to approval of the Legislative Services Commission. The members of the Commission shall receive the same per diem and reimbursement for travel expenses as members of State boards and commissions generally. (1979, c. 1077, s. 1; 1993, c. 438, s. 2.)

Effect of Amendments. — The 1993 amendment, effective July 1, 1993, and applicable to appointments made on or after that date, substituted "Chair" for "Chairman" in the section catchline and throughout the section; in the first sen-

tence inserted "after consultation with the Chief Justice of the Supreme Court"; and in the second sentence substituted "the chair may be reappointed" for "he may be reappointed".

SUBCHAPTER XI. NORTH CAROLINA JUVENILE CODE.

ARTICLE 41.

Purpose; Definitions.

§ 7A-516. Purpose.

Editor's Note. — Session Laws 1993, c. 47, s. 1, effective October 1, 1993, pro-

vides: "There is established a pilot program to be administered by the adminis-

trative Office of the Courts to expand juvenile court jurisdiction in the pilot counties to include as undisciplined juveniles those juveniles at least 16 years of age and under 18 years of age who are beyond the disciplinary control of their parents. The pilot program shall be implemented in Catawba, Bertie, and McDowell Counties. In these counties, for the duration of the pilot, the definition of undisciplined juvenile shall include 'a juvenile at least 16 years of age and less than 18 years of age who is beyond the disciplinary control of his parent, guard-

ian, or custodian.' The purpose of the pilot program is to determine whether juvenile court jurisdiction should be broadened to include such juveniles on a statewide basis. The Administrative Office of the Courts shall evaluate the pilot and file a report on the pilot with the General Assembly on or before the convening of the 1995 Session. The pilot shall terminate April 1, 1995. The pilot program shall be conducted within existing funds of the Administrative Office of the Courts."

CASE NOTES

Juvenile Hearing. — Subchapter XI of Chapter 7A, which contains the North Carolina Juvenile Code, does not classify a juvenile hearing as civil or criminal. *State v. Smith*, 328 N.C. 161, 400 S.E.2d 405, cert. denied, — U.S. —, 112 S. Ct. 414, 116 L. Ed. 2d 435 (1991).

Constitutional Rights At Juvenile Hearing. — There are certain constitutional rights which a juvenile has at a juvenile hearing which are not required in civil trials, such as the right to counsel if there is a possibility of commitment and the privilege against self incrimination. This would suggest a juvenile hearing is not a civil case. *State v.*

Smith, 328 N.C. 161, 400 S.E.2d 405, cert. denied, — U.S. —, 112 S. Ct. 414, 116 L. Ed. 2d 435 (1991).

The district court's authority in juvenile dispositions is limited, etc. —

The North Carolina Juvenile Code (§ 7A-516 et seq.) does not grant the district courts the authority to order the State, through the Division of Youth Services, to develop and implement specific treatment programs and facilities for juveniles. *In re Swindell*, 326 N.C. 473, 390 S.E.2d 134 (1990).

Cited in *In re Doe*, 329 N.C. 743, 407 S.E.2d 798 (1991).

§ 7A-517. Definitions.

Unless the context clearly requires otherwise, the following words have the listed meanings:

- (1) Abused juveniles. — Any juvenile less than 18 years of age whose parent, guardian, custodian, or caretaker:
 - a. Inflicts or allows to be inflicted upon the juvenile a serious physical injury by other than accidental means; or
 - b. Creates or allows to be created a substantial risk of serious physical injury to the juvenile by other than accidental means; or
 - b1. Uses or allows to be used upon the juvenile cruel or grossly inappropriate procedures or cruel or grossly inappropriate devices to modify behavior; or
 - c. Commits, permits, or encourages the commission of a violation of the following laws by, with, or upon the juvenile: first degree rape, as provided in G.S. 14-27.2; second degree rape as provided in G.S. 14-27.3; first degree sexual offense, as provided in G.S. 14-27.4; second degree sexual offense, as provided in G.S. 14-27.5; sexual act by a custodian, as provided in G.S. 14-27.7;

crime against nature, as provided in G.S. 14-177; incest, as provided in G.S. 14-178 and 14-179; preparation of obscene photographs, slides or motion pictures of the juvenile, as provided in G.S. 14-190.5; employing or permitting the juvenile to assist in a violation of the obscenity laws as provided in G.S. 14-190.6; dissemination of obscene material to the juvenile as provided in G.S. 14-190.7 and G.S. 14-190.8; displaying or disseminating material harmful to the juvenile as provided in G.S. 14-190.14 and G.S. 14-190.15; first and second degree sexual exploitation of the juvenile as provided in G.S. 14-190.16 and G.S. 14-190.17; promoting the prostitution of the juvenile as provided in G.S. 14-190.18; and taking indecent liberties with the juvenile, as provided in G.S. 14-202.1, regardless of the age of the parties; or

d. Creates or allows to be created serious emotional damage to the juvenile. Serious emotional damage is evidenced by a juvenile's severe anxiety, depression, withdrawal or aggressive behavior toward himself or others; or

e. Encourages, directs, or approves of delinquent acts involving moral turpitude committed by the juvenile.

(2) Aftercare. — The supervision of a juvenile who has been returned to the community on conditional release after having been committed to the Division of Youth Services.

(3) Administrator for Juvenile Services. — The person who is responsible for the planning, organization, and administration of a statewide system of juvenile intake, probation, and aftercare services.

(4) Director of the Division of Youth Services. — The person responsible for the supervision of the administration of institutional and detention services.

(5) Caretaker. — Any person other than a parent, guardian, or custodian who has responsibility for the health and welfare of a juvenile in a residential setting. A person responsible for a juvenile's health and welfare means a stepparent, foster parent, an adult member of the juvenile's household, an adult relative entrusted with the juvenile's care, or any person such as a house parent or cottage parent who has primary responsibility for supervising a juvenile's health and welfare in a residential child care facility or residential educational facility. "Caretaker" also means any person who has the responsibility for the care of a juvenile in a child day care home or child day care facility as defined in Article 7 of Chapter 110 of the General Statutes and includes any person who has the approval of the care provider to assume responsibility for the juveniles under the care of the care provider. Nothing in this subdivision shall be construed to impose a legal duty of support under Chapter 50 or Chapter 110 of the General Statutes. The duty imposed upon a caretaker as defined in this subdivision shall be for the purpose of Chapter 7A of the General Statutes only.

- (6) Chief Court Counselor. — The person responsible for administration and supervision of juvenile intake, probation, and aftercare in each judicial district, operating under the supervision of the Administrator for Juvenile Services.
- (7) Clerk. — Any clerk of superior court, acting clerk, or assistant or deputy clerk.
- (8) Community-based program. — A program providing non-residential or residential treatment to a juvenile in the community where his family lives. A community-based program may include specialized foster care, family counseling, shelter care, and other appropriate treatment.
- (9) Court. — The District Court Division of the General Court of Justice.
- (10) Court counselor. — A person responsible for probation and aftercare services to juveniles on probation or on conditional release from the Division of Youth Services under the supervision of the chief court counselor.
- (11) Custodian. — The person or agency that has been awarded legal custody of a juvenile by a court.
- (12) Delinquent juvenile. — Any juvenile less than 16 years of age who has committed a crime or infraction under State law or under an ordinance of local government, including violation of the motor vehicle laws.
- (13) Dependent juvenile. — A juvenile in need of assistance or placement because he has no parent, guardian, or custodian responsible for the juvenile's care or supervision or whose parent, guardian, or custodian, due to physical or mental incapacity and the absence of an appropriate alternative child care arrangement, is unable to provide for the care or supervision.
- (14) Detention. — The confinement of a juvenile pursuant to an order for secure custody pending an adjudicatory or dispositional hearing or admission to a placement with the Division of Youth Services.
- (15) Detention home. — An authorized facility providing secure custody for juveniles.
- (15a) District. — Any district court district as established by G.S. 7A-133.
- (16) Holdover facility. — A place in a jail which has been approved by the Department of Human Resources as meeting the State standards for detention as required in G.S. 153A-221 providing close supervision where the juvenile cannot converse with, see, or be seen by the adult population.
- (16.1) In loco parentis. — A person acting in loco parentis means one, other than parents or legal guardian, who has assumed the status and obligation of a parent without being awarded the legal custody of a juvenile by a court.
- (17) Intake counselor. — A person who screens a petition alleging that a juvenile is delinquent or undisciplined to determine whether the petition should be filed.
- (18) Interstate Compact on Juveniles. — An agreement ratified by 50 states and the District of Columbia providing a formal means of returning a juvenile, who is an absconder, escapee or runaway, to his home state.
- (19) Judge. — Any district court judge.

- (19a) Judicial district. — Any district court district as established by G.S. 7A-133.
- (20) Juvenile. — Any person who has not reached his eighteenth birthday and is not married, emancipated, or a member of the armed services of the United States. For the purposes of subdivisions (12) and (28) of this section, a juvenile is any person who has not reached his sixteenth birthday and is not married, emancipated, or a member of the armed forces. A juvenile who is married, emancipated, or a member of the armed forces, shall be prosecuted as an adult for the commission of a criminal offense. Wherever the term "juvenile" is used with reference to rights and privileges, that term encompasses the attorney for the juvenile as well.
- (21) Neglected juvenile. — A juvenile who does not receive proper care, supervision, or discipline from the juvenile's parent, guardian, custodian, or caretaker; or who has been abandoned; or who is not provided necessary medical care; or who is not provided necessary remedial care; or who lives in an environment injurious to the juvenile's welfare; or who has been placed for care or adoption in violation of law. In determining whether a juvenile is a neglected juvenile, it is relevant whether that juvenile lives in a home where another juvenile has died as a result of abuse or neglect or lives in a home where another juvenile has been subjected to sexual abuse or severe physical abuse by an adult who regularly lives in the home.
- (22) Petitioner. — The individual who initiates court action, whether by the filing of a petition or of a motion for review alleging the matter for adjudication.
- (23) Probation. — The status of a juvenile who has been adjudicated delinquent, is subject to specified conditions under the supervision of a court counselor, and may be returned to the court for violation of those conditions during the period of probation.
- (24) Prosecutor. — The assistant district attorney assigned by the district attorney to juvenile proceedings.
- (25) Protective supervision. — The status of a juvenile who has been adjudicated delinquent or undisciplined and is under the supervision of a court counselor.
- (26) Regional detention home. — A state-supported and administered regional facility providing detention care.
- (27) Shelter care. — The temporary care of a juvenile in a physically unrestricting facility pending court disposition.
- (28) Undisciplined juvenile. — A juvenile less than 16 years of age who is unlawfully absent from school; or who is regularly disobedient to his parent, guardian, or custodian and beyond their disciplinary control; or who is regularly found in places where it is unlawful for a juvenile to be; or who has run away from home.
- (29) Director of the department of social services. — The director of the county department of social services in the county in which the juvenile resides or is found, or his representative as authorized in G.S. 108A-14.

The singular includes the plural, the masculine singular includes the feminine singular and masculine and feminine plural unless

otherwise specified. (1979, c. 815, s. 1; 1981, c. 336; c. 359, s. 2; c. 469, ss. 1-3; c. 716, s. 1; 1985, c. 648; c. 757, s. 156(q); 1985 (Reg. Sess., 1986), c. 852, s. 16; 1987, c. 162; c. 695; 1987 (Reg. Sess., 1988), c. 1037, ss. 36, 37; 1989 (Reg. Sess., 1990), c. 815, s. 1; 1991, c. 258, s. 3; c. 273, s. 11; 1991 (Reg. Sess., 1992), c. 1030, s. 3; 1993, c. 324, s. 1; c. 516, ss. 1-3.)

Editor's Note. — Session Laws 1993, c. 47, s. 1, effective October 1, 1993, provides: "There is established a pilot program to be administered by the administrative Office of the Courts to expand juvenile court jurisdiction in the pilot counties to include as undisciplined juveniles those juveniles at least 16 years of age and under 18 years of age who are beyond the disciplinary control of their parents. The pilot program shall be implemented in Catawba, Bertie, and McDowell Counties. In these counties, for the duration of the pilot, the definition of undisciplined juvenile shall include 'a juvenile at least 16 years of age and less than 18 years of age who is beyond the disciplinary control of his parent, guardian, or custodian.' The purpose of the pilot program is to determine whether juvenile court jurisdiction should be broadened to include such juveniles on a statewide basis. The Administrative Office of the Courts shall evaluate the pilot and file a report on the pilot with the General Assembly on or before the convening of the 1995 Session. The pilot shall terminate April 1, 1995. The pilot program shall be conducted within existing funds of the Administrative Office of the Courts."

Session Laws 1993, c. 516, which amended this section, in s. 13 provides: "Nothing in this act obligates the General Assembly to make any appropriations to implement it."

Effect of Amendments. —

The 1989 (Reg. Sess., 1990) amendment, effective July 1, 1990, added the second sentence in subdivision (21).

Session Laws 1991, c. 273, s. 11, effective October 1, 1991, in subdivision (5) substituted "child day care home" for "day-care plan" in the last sentence.

Session Laws 1991, c. 258, s. 3, effective June 11, 1991, added subdivision (29).

The 1991 (Reg. Sess., 1992) amendment, effective July 24, 1992, substituted "judicial" for "judical" in subdivision (6).

Session Laws 1993, c. 324, s. 1, effective July 9, 1993, and applicable to adjudications for acts or omissions on or after that date, in subdivision (21), substituted "the juvenile's parent" for "his parent", substituted "care; or who is not provided necessary" for "care or other", deleted "recognized under State law" preceding "or who lives in an environment", substituted "the juvenile's welfare" for "his welfare" and made other stylistic changes.

Session Laws 1993, c. 516, ss. 1, 2 and 3, effective October 1, 1993, and applicable to allegations of abuse, neglect, or dependency initiating on or after that date, in the introductory language of subdivision (1) substituted "parent, guardian, custodian, or caretaker:" for "parent or other person responsible for his care:"; in subdivision (1)a. inserted "serious" and deleted from the end "which causes or creates a substantial risk of death, disfigurement, impairment of physical health, or loss or impairment of function of any bodily organ"; in subdivision (1)b. inserted "serious" and deleted from the end "which would be likely to cause death, disfigurement, impairment of physical health, or loss or impairment of the function of any bodily organ"; added subdivision (1)b1.; in subdivision (1)c. added "or" at the end; in subdivision (1)d. deleted "and refuses to permit, provide for, or participate in treatment" from the end of the first sentence; rewrote subdivision (5); and rewrote subdivision (13).

Legal Periodicals. —

For article concerning the state's failure to protect children and substantive due process, see 68 N.C.L. Rev. (1990).

CASE NOTES

- I. General Consideration.
- III. Neglected Juvenile.
- V. Abused Juvenile.

I. GENERAL CONSIDERATION.

Applied in *In re Krauss*, 102 N.C. App. 112, 401 S.E.2d 123 (1991); *In re Beck*, 109 N.C. App. 539, 428 S.E.2d 232 (1993).

Quoted in *In re Safriet*, 112 N.C. App. 747, 436 S.E.2d 898 (1993).

Cited in *In re Scott*, 95 N.C. App. 760, 383 S.E.2d 690 (1989); *Herell v. Taylor*, 97 N.C. App. 57, 387 S.E.2d 230 (1990); *In re Quevedo*, 106 N.C. App. 574, 419 S.E.2d 158 (1992); *United States v. Lender*, 985 F.2d 151 (4th Cir. 1993); *In re Becker*, 111 N.C. App. 85, 431 S.E.2d 820 (1993); *In re Duncan*, 112 N.C. App. 196, 435 S.E.2d 121 (1993); *In re Davis*, 114 N.C. App. 253, 441 S.E.2d 696 (1994); *Clark v. Red Bird Cab Co.*, 114 N.C. App. 400, 442 S.E.2d 75 (1994).

III. NEGLECTED JUVENILE.

Failure to Provide Medical Care, etc. —

A finding of neglect by clear and convincing evidence was proper where the children were kept at home, and they did not receive proper medical care, supervision, or adequate nutrition. *In re Bell*, 107 N.C. App. 566, 421 S.E.2d 590, appeal withdrawn, 333 N.C. 168, 426 S.E.2d 699 (1992).

Evidence of abuse of another child in the home is relevant in determining whether a child is a neglected juvenile; however, the removal of all other children from the home once a child has either died or been subjected to sexual or severe physical abuse is not required. *In re Nicholson*, 114 N.C. App. 91, 440 S.E.2d 852 (1994).

Evidence Held Sufficient to Show Neglect. —

The evidence before the trial court was sufficient to support its findings of

abuse and neglect where: (1) Child, while in respondent's sole care, suffered multiple burns over a wide portion of her body; (2) no accidental cause was established, and the child in fact stated that respondent burned her; (3) the burns were serious, requiring prompt medical attention; (4) respondent did not seek treatment for the child's injuries and refused to permit social worker to do so; and (5) the child was taken for treatment only upon the intervention of the sheriff's department, over respondent's opposition. *In re Hayden*, 96 N.C. App. 77, 384 S.E.2d 558 (1989).

Trial court's ordering of neglected juvenile into the custody of the Department of Social Services was not error, even though it was unable, at the time, to provide adequate living and educational facilities for the juvenile. *In re Kennedy*, 103 N.C. App. 632, 406 S.E.2d 307 (1991).

V. ABUSED JUVENILE.

Evidence Held Sufficient to Show Abuse. — The evidence before the trial court was sufficient to support its findings of abuse and neglect where: (1) Child, while in respondent's sole care, suffered multiple burns over a wide portion of her body; (2) no accidental cause was established, and the child in fact stated that respondent burned her; (3) the burns were serious, requiring prompt medical attention; (4) respondent did not seek treatment for the child's injuries and refused to permit social worker to do so; and (5) the child was taken for treatment only upon the intervention of the sheriff's department, over respondent's opposition. *In re Hayden*, 96 N.C. App. 77, 384 S.E.2d 558 (1989).

OPINIONS OF ATTORNEY GENERAL

Editor's Note. — The citation to the *Opinions of Attorney General* annotated

under this section in the main volume should be to 48 N.C.A.G. 35 (1978).

ARTICLE 42.

Jurisdiction.

§ 7A-523. Jurisdiction.

Legal Periodicals. —

For article, "Re-Imaging Childhood and Reconstructing the Legal Order: the

Case for Abolishing the Juvenile Court," see 69 N.C.L. Rev. 1083 (1991).

CASE NOTES

Power to Order Sex Offender Treatment. — The district court had power to order the Department of Human Resources, Division of Youth Services to give sex offender treatment to an adolescent found delinquent because of sex offenses and subsequently to deny the conditional release of that adolescent because treatment had not been in compliance with that mandate. In re Doe, 329 N.C. 743, 407 S.E.2d 798 (1991).

Ordering Division of Youth Services to provide specific treatment for sexual offenders for a delinquent juvenile in its custody, when such treatment was available, was within the scope of the court's statutory authority. In re Doe, 329 N.C. 743, 407 S.E.2d 798 (1991).

Applied in In re Phillips, 99 N.C. App. 159, 392 S.E.2d 407 (1990).

Quoted in In re Davis, 114 N.C. App. 253, 441 S.E.2d 696 (1994).

§ 7A-524. Retention of jurisdiction.

CASE NOTES

Applied in In re Phillips, 99 N.C. App. 159, 392 S.E.2d 407 (1990); In re Cowles, 108 N.C. App. 74, 422 S.E.2d 443 (1992).

Quoted in In re Doe, 329 N.C. 743, 407 S.E.2d 798 (1991).

ARTICLE 43.

Screening of Delinquency and Undisciplined Petitions.

§ 7A-530. Intake services.

CASE NOTES

Cited in In re Doe, 329 N.C. 743, 407 S.E.2d 798 (1991).

ARTICLE 44.

*Screening of Abuse and Neglect Complaints.***§ 7A-542. Protective services.**

The Director of the Department of Social Services in each county of the State shall establish protective services for juveniles alleged to be abused, neglected, or dependent.

Protective services shall include the investigation and screening of complaints, casework or other counseling services to parents or other caretakers as provided by the director to help the parents or other caretakers and the court to prevent abuse or neglect, to improve the quality of child care, to be more adequate parents or caretakers, and to preserve and stabilize family life.

The provisions of this Article shall also apply to child day care facilities and child day care homes as defined in G.S. 110-86. (1979, c. 815, s. 1; 1981, c. 359, s. 1; 1991 (Reg. Sess., 1992), c. 923, s. 1.)

Effect of Amendments. — The 1991 (Reg. Sess., 1992) amendment, effective August 1, 1992, and applicable to investigations of allegations received by directors of local departments of social services on and after that date, substituted "child day care facilities and child day

care homes" for "day care facilities and day care plans" in the last paragraph.

Legal Periodicals. —

For article, "Mental Health Care for Children: Before and During State Custody," see 13 Campbell L. Rev. 1 (1990).

§ 7A-543. Duty to report child abuse, neglect, dependency, or death due to maltreatment.

Any person or institution who has cause to suspect that any juvenile is abused, neglected, or dependent, as defined by G.S. 7A-517, or has died as the result of maltreatment, shall report the case of that juvenile to the Director of the Department of Social Services in the county where the juvenile resides or is found. The report may be made orally, by telephone, or in writing. The report shall include information as is known to the person making it including the name and address of the juvenile; the name and address of the juvenile's parent, guardian, or caretaker; the age of the juvenile; the names and ages of other juveniles in the home; the present whereabouts of the juvenile if not at the home address; the nature and extent of any injury or condition resulting from abuse, neglect, or dependency; and any other information which the person making the report believes might be helpful in establishing the need for protective services or court intervention. If the report is made orally or by telephone, the person making the report shall give the person's name, address, and telephone number. Refusal of the person making the report to give a name shall not preclude the Department's investigation of the alleged abuse, neglect, dependency, or death as a result of maltreatment.

Upon receipt of any report of child sexual abuse in a day care facility or day care home, the Director shall notify the State Bureau of Investigation within 24 hours or on the next work day. If child sexual abuse in a day care facility or day care home is not alleged in

the initial report, but during the course of the investigation there is reason to suspect that child sexual abuse has occurred, the Director shall immediately notify the State Bureau of Investigation. Upon notification that child sexual abuse may have occurred in a day care facility or day care home, the State Bureau of Investigation may form a task force to investigate the report. (1979, c. 815, s. 1; 1991 (Reg. Sess., 1992), c. 923, s. 2; 1993, c. 516, s. 4.)

Editor's Note. — Session Laws 1993, c. 516, which amended this section, in s. 13 provides: "Nothing in this act obligates the General Assembly to make any appropriations to implement it."

Effect of Amendments. — The 1991 (Reg. Sess., 1992) amendment, effective August 1, 1992, and applicable to investigations of allegations received by directors of local departments of social services on and after that date, added the last paragraph.

The 1993 amendment, effective October 1, 1993, and applicable to allegations of abuse, neglect, or dependency initiating on or after that date, in the section catchline substituted "abuse, neglect, dependency, or death due to maltreatment" for "abuse or neglect"; in the first paragraph, in the first sentence substituted "abused, neglected, or de-

pendent, as defined by G.S. 7A-517, or has died as the result of maltreatment" for "abused or neglected", in the third sentence inserted "the names and ages of other juveniles in the home" and substituted "abuse, neglect, or dependency" for "abuse or neglect", in the fourth sentence substituted "the person's name" for "his name" and in the fifth sentence substituted "a name" for "his name" and substituted "abuse, neglect, dependency, or death as a result of maltreatment" for "abuse or neglect"; and deleted the former second paragraph regarding reports to local law enforcement agencies.

Legal Periodicals. —

For article, "Child Abuse Reporting Laws and Attorney-Client Confidences: The Reality and the Specter of Lawyer as Informant," see 1992 Duke L.J. 203.

CASE NOTES

This section makes no exceptions for extenuating circumstances in reporting suspected child abuse. *White v. North Carolina State Bd. of Exmrs. of*

Practicing Psychologists, 97 N.C. App. 144, 388 S.E.2d 148, cert. denied, 326 N.C. 601, 393 S.E.2d 891 (1990).

§ 7A-544. Investigation by Director; access to confidential information; notification of person making the report.

When a report of abuse, neglect, or dependency is received, the Director of the Department of Social Services shall make a prompt and thorough investigation in order to ascertain the facts of the case, the extent of the abuse or neglect, and the risk of harm to the juvenile, in order to determine whether protective services should be provided or the complaint filed as a petition. When the report alleges abuse, the Director shall immediately, but no later than 24 hours after receipt of the report, initiate the investigation. When the report alleges neglect or dependency, the Director shall initiate the investigation within 72 hours following receipt of the report. The investigation and evaluation shall include a visit to the place where the juvenile resides. All information received by the Department of Social Services shall be held in strictest confidence by the Department.

When a report of a juvenile's death as a result of suspected maltreatment is received, the Director of the Department of Social Ser-

vices shall immediately ascertain if other juveniles remain in the home, and, if so, initiate an investigation in order to determine whether they require protective services or whether immediate removal of the juveniles from the home is necessary for their protection.

If the investigation indicates that abuse, neglect, or dependency has occurred, the Director shall decide whether immediate removal of the juvenile or any other juveniles in the home is necessary for their protection. If immediate removal does not seem necessary, the Director shall immediately provide or arrange for protective services. If the parent or other caretaker refuses to accept the protective services provided or arranged by the Director, the Director shall sign a complaint seeking to invoke the jurisdiction of the court for the protection of the juvenile or juveniles.

If immediate removal seems necessary for the protection of the juvenile or other juveniles in the home, the Director shall sign a complaint which alleges the applicable facts to invoke the jurisdiction of the court. Where the investigation shows that it is warranted, a protective services worker may assume temporary custody of the juvenile for the juvenile's protection pursuant to Article 46 of this Chapter.

In performing any of these duties, the Director may consult with any public or private agencies or individuals, including the available State or local law-enforcement officers who shall assist in the investigation and evaluation of the seriousness of any report of abuse, neglect, or dependency when requested by the Director. The Director or the Director's representative may make a written demand for any information or reports, whether or not confidential, that may in the Director's opinion be relevant to the protective services case. Upon the Director's or the Director's representative's request and unless protected by the attorney-client privilege, any public or private agency or individual shall provide access to and copies of this confidential information and these records to the extent permitted by federal law and regulations. If a custodian of criminal investigative information or records believes that release of such information will jeopardize the right of the State to prosecute a defendant or the right of a defendant to receive a fair trial or will undermine an ongoing or future investigation, it may seek an order from a court of competent jurisdiction to prevent disclosure of the information. In such an action, the custodian of the records shall have the burden of showing by a preponderance of the evidence that disclosure of the information in question will jeopardize the right of the State to prosecute a defendant or the right of a defendant to receive a fair trial or will undermine an ongoing or future investigation. Actions brought pursuant to this paragraph shall be set down for immediate hearing, and subsequent proceedings in such actions shall be accorded priority by the trial and appellate courts.

Within five working days after receipt of the report of abuse, neglect, or dependency, the Director shall give written notice to the person making the report, unless requested by that person not to give notice, as to whether the report was accepted for investigation and whether the report was referred to the appropriate State or local law enforcement agency.

Within five working days after completion of the protective services investigation, the Director shall give subsequent written no-

tice to the person making the report, unless requested by that person not to give notice, as to whether there is a finding of abuse, neglect, or dependency, whether the county Department of Social Services is taking action to protect the juvenile, and what action it is taking.

The second notification shall include notice that, if the person making the report is not satisfied with the Director's decision, he may request review of the decision by the prosecutor within five working days of receipt. The person making the report may waive his right to this notification and no notification is required if the person making the report does not identify himself to the Director. (1979, c. 815, s. 1; 1985, c. 205; 1991, c. 593, s. 1; 1991 (Reg. Sess., 1992), c. 923, s. 3; 1993, c. 516, s. 5.)

Editor's Note. — Session Laws 1991, c. 593, which amended this section, in s. 4 provides: "The Department of Human Resources, and the Department of Justice shall adopt rules to ensure that the three investigations of abuse in child day care undertaken by the director of the county department of social services, the Department of Human Resources, and the State Bureau of Investigation, do not interfere with one another. These rules shall also include development of methods by which the State Bureau of Investigation instructs the Department of Human Resources and the director of the county department of social services on ways to conduct their investigations without destroying evidence that the State Bureau of Investigation may be gathering for a possible criminal trial."

"The Department of Human Resources and the Department of Justice shall make a joint report in writing to the Joint Legislative Commission on Governmental Operations by March 1, 1992, as to whether any legislation needs to be changed to effect this act."

Session Laws 1993, c. 516, which amended this section, in s. 13 provides: "Nothing in this act obligates the General Assembly to make any appropriations to implement it."

Effect of Amendments. — The 1991 amendment, effective October 1, 1991, inserted "notification of State Bureau of Investigation if sexual abuse in day care" in the catchline and added the third and fourth sentences of the fourth paragraph.

The 1991 (Reg. Sess., 1992) amendment, effective August 1, 1992, and applicable to investigations of allegations received by directors of local departments of social services on and after that date, deleted "notification of State Bureau of Investigation if sexual abuse in day care" preceding "notification of person" in the catchline, and deleted the last two sentences of the fourth paragraph which read: "If the Director's initial investigation of a report of abuse in a day care facility reveals sexual abuse may have occurred, the Director shall notify the State Bureau of Investigation of the results of the initial investigation within 24 hours or on the next working day. The State Bureau of Investigation may send a task force to investigate the alleged sexual abuse and gather evidence that may be presented at a criminal trial."

The 1993 amendment, effective October 1, 1993, and applicable to allegations of abuse, neglect, or dependency initiating on or after that date, inserted "access to confidential information" in the section catchline; in the first paragraph, in the first sentence substituted "abuse, neglect, or dependency" for "abuse or neglect" and in the second sentence substituted "neglect or dependency" for "neglect"; added the second paragraph; in the first sentence of the third paragraph substituted "indicates that abuse, neglect, or dependency has occurred" for "reveals abuse or neglect"; and rewrote the fifth through seventh paragraphs.

CASE NOTES

Department of Social Services Employee Subject to Liability for Violation of This Section. — Trial court's entry of summary judgment in favor of defendant employee of county Department of Social Services was erroneously entered on the grounds that she was a public official; it had been determined,

on earlier appeal, that she was an employee and could be subject to liability in performance of her official duties for violation of this section. *Coleman v. Cooper*, 102 N.C. App. 650, 403 S.E.2d 577, cert. denied, 329 N.C. 786, 408 S.E.2d 517 (1991).

§ 7A-544.1. Interference with investigation.

(a) If any person obstructs or interferes with an investigation required by G.S. 7A-544, the Director may file a petition naming said person as respondent and requesting an order directing the respondent to cease such obstruction or interference. The petition shall contain the name and date of birth and address of the juvenile who is the subject of the investigation, shall specifically describe the conduct alleged to constitute obstruction of or interference with the investigation, and shall be verified.

(b) For purposes of this section, obstruction of or interference with an investigation means refusing to disclose the whereabouts of the juvenile, refusing to allow the director to have personal access to the juvenile, refusing to allow the director to observe or interview the juvenile in private, refusing to allow the Director access to confidential information and records upon request pursuant to G.S. 7A-544, refusing to allow the director to arrange for an evaluation of the juvenile by a physician or other expert, or other conduct that makes it impossible for the director to carry out the duty to investigate.

(c) Upon filing of the petition, the court shall schedule a hearing to be held not less than five days after service of the petition and summons on the respondent. Service of the petition and summons and notice of hearing shall be made as provided by the Rules of Civil Procedure on the respondent; the juvenile's parent, guardian, custodian, or caretaker; and any other person determined by the court to be a necessary party. If at the hearing on the petition the court finds by clear, cogent and convincing evidence that the respondent, without lawful excuse, has obstructed or interfered with an investigation required by G.S. 7A-544, the court may order the respondent to cease such obstruction or interference. The burden of proof shall be on the petitioner.

(d) If the director has reason to believe that the juvenile is in need of immediate protection or assistance, he shall so allege in the petition and may seek an ex parte order from the court. If the court, from the verified petition and any inquiry the court makes of the director, finds probable cause to believe both that the juvenile is at risk of immediate harm and that the respondent is obstructing or interfering with the director's ability to investigate to determine the juvenile's condition, the court may enter an ex parte order directing the respondent to cease such obstruction or interference. The order shall be limited to provisions necessary to enable the Director to conduct an investigation sufficient to determine whether the juvenile is in need of immediate protection or assistance. Within 10 days after the entry of an ex parte order under this subsection, a hearing shall be held to determine whether there is

good cause for the continuation of the order or the entry of a different order. An order entered under this subsection shall be served on the respondent along with a copy of the petition, summons, and notice of hearing.

(e) The Director may be required at a hearing under this section to reveal the identity of any person who made a report of suspected abuse or neglect as required by G.S. 7A-543.

(f) An order entered pursuant to this section is enforceable by civil or criminal contempt as provided in Chapter 5A of the General Statutes. (1987, c. 409, s. 1; 1993, c. 516, s. 6.)

Editor's Note. — Session Laws 1993, c. 516, which amended this section, in s. 13 provides: "Nothing in this act obligates the General Assembly to make any appropriations to implement it."

Effect of Amendments. — The 1993 amendment, effective October 1, 1993, and applicable to allegations of abuse,

neglect, or dependency initiating on or after that date, in subsection (b) inserted "refusing to allow the Director access to confidential information and records upon request pursuant to G.S. 7A-544" and substituted "the duty" for "his duty".

CASE NOTES

Damages and Attorney's Fees Not Recoverable. — United States District Court found no provision in this section that would allow the plaintiffs to seek damages or attorneys' fees from the De-

partment of Social Services in Obstruction Petition proceedings. *Renn ex rel. Renn v. Garrison*, 845 F. Supp. 1127 (E.D.N.C. 1994).

§ 7A-547. Review by prosecutor.

The prosecutor shall review the Director's determination that a petition should not be filed within 20 days after the person making the report is notified. The review shall include conferences with the person making the report, the protective services worker, the juvenile, if practicable, and other persons known to have pertinent information about the juvenile or the juvenile's family. At the conclusion of the conferences, the prosecutor may affirm the decision made by the Director, may request the appropriate local law enforcement agency to investigate the allegations, or may direct the Director to file a petition. (1979, c. 815, s. 1; 1981, c. 469, s. 7; 1993, c. 516, s. 7.)

Editor's Note. — Session Laws 1993, c. 516, which amended this section, in s. 13 provides: "Nothing in this act obligates the General Assembly to make any appropriations to implement it."

Effect of Amendments. — The 1993 amendment, effective October 1, 1993, and applicable to allegations of abuse, neglect, or dependency initiating on or

after that date, in the second sentence substituted "the juvenile's family" for "his family" and in the third sentence inserted "may request the appropriate local law enforcement agency to investigate the allegations" and substituted "direct the Director to file" for "authorize the filing".

§ 7A-548. Duty of Director to report evidence of abuse, neglect; investigation by local law enforcement; notification of Department of Human Resources and State Bureau of Investigation.

(a) If the Director finds evidence that a juvenile may have been abused as defined by G.S. 7A-517(1), the Director shall make an immediate oral and subsequent written report of the findings to the district attorney or the district attorney's designee and the appropriate local law enforcement agency within 48 hours after receipt of the report. The local law enforcement agency shall immediately, but no later than 48 hours after receipt of the information, initiate and coordinate a criminal investigation with the protective services investigation being conducted by the county Department of Social Services. Upon completion of the investigation, the district attorney shall determine whether criminal prosecution is appropriate and may request the Director or the Director's designee to appear before a magistrate.

If the Director receives information that a juvenile may have been physically harmed in violation of any criminal statute by any person other than the juvenile's parent, guardian, custodian, or caretaker, the Director shall make an immediate oral and subsequent written report of that information to the district attorney or the district attorney's designee and to the appropriate local law enforcement agency within 48 hours after receipt of the information. The local law enforcement agency shall immediately, but no later than 48 hours after receipt of the information, initiate a criminal investigation. Upon completion of the investigation, the district attorney shall determine whether criminal prosecution is appropriate.

If the report received pursuant to G.S. 7A-543 involves abuse or neglect of a juvenile in day care, either in a day care facility or a day care home, the Director shall notify the Department of Human Resources within 24 hours or on the next working day of receipt of the report.

(a1) If the Director finds evidence that a juvenile has been abused or neglected as defined by G.S. 7A-517 in a day care facility or day care home, he shall immediately so notify the Department of Human Resources and, in the case of child sexual abuse, the State Bureau of Investigation, in such a way as does not violate the law guaranteeing the confidentiality of the records of the Department of Social Services.

(a2) Upon completion of the investigation, the Director shall give the Department written notification of the results of the investigation required by G.S. 7A-544. Upon completion of an investigation of child sexual abuse in a day care facility or day care home, the Director shall also make written notification of the results of the investigation to the State Bureau of Investigation.

The Director of the Department of Social Services shall submit a report of alleged abuse, neglect, or dependency cases or child fatalities that are the result of alleged maltreatment to the central registry under the policies adopted by the Social Services Commission.

(b) Repealed by Session Laws 1991, (Reg. Sess. 1992), c. 923, s. 4, effective August 1, 1992. (1979, c. 815, s. 1; 1983, c. 199; 1985, c.

757, s. 156(s)-(u); 1991, c. 593, s. 2; 1991 (Reg. Sess., 1992), c. 923, s. 4; 1993, c. 516, s. 8.)

Editor's Note. — Session Laws 1991, c. 593, which amended this section, in s. 4 provides: "The Department of Human Resources, and the Department of Justice shall adopt rules to ensure that the three investigations of abuse in child day care undertaken by the director of the county department of social services, the Department of Human Resources, and the State Bureau of Investigation, do not interfere with one another. These rules shall also include development of methods by which the State Bureau of Investigation instructs the Department of Human Resources and the director of the county department of social services on ways to conduct their investigations without destroying evidence that the State Bureau of Investigation may be gathering for a possible criminal trial."

"The Department of Human Resources and the Department of Justice shall make a joint report in writing to the Joint Legislative Commission on Governmental Operations by March 1, 1992, as to whether any legislation needs to be changed to effect this act."

Session Laws 1993, c. 516, which amended this section, in s. 13 provides: "Nothing in this act obligates the General Assembly to make any appropriations to implement it."

Effect of Amendments. — The 1991 amendment, effective October 1, 1991, substituted "Department of Human Resources and State Bureau of Investigation" for "Child Day Care Commission" in the catchline; in subsection (a), in the third paragraph in the first sentence, substituted "day care facility or a day care home" for "day-care facility or a day-care plan" and substituted "Depart-

ment of Human Resources" for "North Carolina Child Day Care Commission", substituted "Department" for "Commission" in the second sentence, and added the third sentence; in subsection (b) substituted "day care facility or home" for "day-care facility or plan" and substituted "Department of Human Resources and the State Bureau of Investigation" for "Child Day Care Commission."

The 1991 (Reg. Sess., 1992) amendment, effective August 1, 1992, and applicable to investigations of allegations received by directors of local departments of social services on and after that date, added subsection (a1), designated the former fourth paragraph of subsection (a) as subsection (a2) and rewrote the language therein, and repealed subsection (b) which read: "If the Director finds evidence that a juvenile has been abused or neglected as defined by G.S. 7A-517 in a day care facility or home, he shall immediately so notify the Department of Human Resources and the State Bureau of Investigation in such a way as does not violate the law guaranteeing the confidentiality of the records of the Department of Social Services."

The 1993 amendment, effective October 1, 1993, and applicable to allegations of abuse, neglect, or dependency initiating on or after that date, in the section catchline inserted "investigation by local law enforcement"; rewrote the first two paragraphs of subsection (a); and in the second paragraph of subsection (a2) substituted "abuse, neglect, or dependency cases or child fatalities that are the result of alleged maltreatment" for "abuse or neglect".

CASE NOTES

Social Worker's Role Changed to Agent of State. —

In a case involving crimes against child victim where a social worker went beyond merely fulfilling her role as the victim's social worker and began working with the sheriff's department on the case prior to interviewing defendant, the social worker's role changed and became essentially like that of an agent of the State; accordingly, because the social worker did not

advise defendant of her Miranda rights, the trial court erred in denying defendant's motion to suppress statements made during her interview with the social worker. *State v. Morrell*, 108 N.C. App. 465, 424 S.E.2d 147, appeal dismissed, 333 N.C. 463, 427 S.E.2d 626 (1993).

Quoted in *Coleman v. Cooper*, 102 N.C. App. 650, 403 S.E.2d 577 (1991).

§ 7A-549. Authority of medical professionals in abuse cases.

CASE NOTES

The medical evaluation of juveniles is of critical importance in proceedings involving allegations of abuse

and neglect under the Juvenile Code (§ 7A-516 et seq.). In re Hayden, 96 N.C. App. 77, 384 S.E.2d 558 (1989).

§ 7A-550. Immunity of persons reporting and cooperating in an investigation.

Anyone who makes a report pursuant to this Article, cooperates with the county department of social services in a protective services inquiry or investigation, testifies in any judicial proceeding resulting from a protective services report or investigation, or otherwise participates in the program authorized by this Article, is immune from any civil or criminal liability that might otherwise be incurred or imposed for such action provided that the person was acting in good faith. In any proceeding involving liability, good faith is presumed. (1979, c. 815, s. 1; 1981, s. 469, s. 8; 1993, c. 516, s. 9.)

Editor's Note. — As amended by Session Laws 1993, c. 516, s. 9, this section contained a subsection "(a)" designation. The subsection "(a)" designation has not been set out at the direction of the Revisor of Statutes.

Session Laws 1993, c. 516, which amended this section, in s. 13 provides: "Nothing in this act obligates the General Assembly to make any appropriations to implement it."

Effect of Amendments. — The 1993

amendment, effective October 1, 1993, and applicable to allegations of abuse, neglect, or dependency initiating on or after that date, in the section catchline added at the end "and cooperating in an investigation"; added the subsection (a) designation; in the first sentence of subsection (a) substituted "a protective services" for "any ensuing" and substituted "a protective services report or investigation" for "the report".

§ 7A-551. Privileges not grounds for failing to report or for excluding evidence.

No privilege shall be grounds for any person or institution failing to report that a juvenile may have been abused, neglected, or dependent, even if the knowledge or suspicion is acquired in an official professional capacity, except when the knowledge or suspicion is gained by an attorney from that attorney's client during representation only in the abuse, neglect or dependency case. No privilege, except the attorney-client privilege, shall be grounds for excluding evidence of abuse, neglect, or dependency in any judicial proceeding (civil, criminal, or juvenile) in which a juvenile's abuse, neglect, or dependency is in issue nor in any judicial proceeding resulting from a report submitted under this Article, both as this privilege relates to the competency of the witness and to the exclusion of confidential communications. (1979, c. 815, s. 1; 1987, c. 323, s. 1; 1993, c. 514, s. 3; c. 516, s. 10.)

Editor's Note. — Session Laws 1993, c. 514, s. 4 is a severability clause.

Session Laws 1993, c. 514, s. 5 provides that the Board's rule-making authority under the act is effective upon ratification of the act. The act was ratified July 24, 1993.

Session Laws 1993, c. 516, which amended this section, in s. 13 provides: "Nothing in this act obligates the General Assembly to make any appropriations to implement it."

Effect of Amendments. — Session Laws 1993, c. 514, s. 3, effective July 1, 1994, amended this section as it read

prior to its amendment by Session Laws 1993, c. 516, s. 10, by including the licensed professional counselor-client privilege among the privileges listed.

Session Laws 1993, c. 516, s. 10, effective October 1, 1993, and applicable to allegations of abuse, neglect, or dependency initiating on or after that date, in the section catchline inserted "failing to report or for" and rewrote the section.

This section is set out above as amended by Session Laws 1993, c. 516, s. 10 at the direction of the Revisor of Statutes.

CASE NOTES

The medical evaluation of juveniles is of critical importance in proceedings involving allegations of abuse

and neglect under the Juvenile Code (§ 7A-516 et seq.). In re Hayden, 96 N.C. App. 77, 384 S.E.2d 558 (1989).

§ 7A-552. Central registry.

The Department of Human Resources shall maintain a central registry of abuse, neglect, and dependency cases and child fatalities that are the result of alleged maltreatment that are reported under this Article in order to compile data for appropriate study of the extent of abuse and neglect within the State and to identify repeated abuses of the same juvenile or of other juveniles in the same family. This data shall be furnished by county directors of social services to the Department of Human Resources and shall be confidential, subject to policies adopted by the Social Services Commission providing for its use for study and research and for other appropriate disclosure. Data shall not be used at any hearing or court proceeding unless based upon a final judgment of a court of law. (1979, c. 815, s. 1; 1993, c. 516, s. 11.)

Editor's Note. — Session Laws 1993, c. 516, which amended this section, in s. 13 provides: "Nothing in this act obligates the General Assembly to make any appropriations to implement it."

Effect of Amendments. — The 1993 amendment, effective October 1, 1993, and applicable to allegations of abuse, neglect, or dependency initiating on or after that date, in the first sentence sub-

stituted "abuse, neglect, and dependency cases and child fatalities that are the result of alleged maltreatment that are" for "abuse and neglect cases"; and in the second sentence substituted "providing" for "which provide", deleted "appropriate" preceding "use for study" and added at the end "and for other appropriate disclosure".

CASE NOTES

Cited in Coleman v. Cooper, 102 N.C. App. 650, 403 S.E.2d 577 (1991).

ARTICLE 45.

*Venue; Petition; Summons.***§ 7A-558. Venue.**

CASE NOTES

Cited in *In re Phillips*, 99 N.C. App. 159, 392 S.E.2d 407 (1990).

ARTICLE 46.

*Temporary Custody; Secure and Nonsecure Custody; Custody Hearings.***§ 7A-571. Taking a juvenile into temporary custody.**

Temporary custody means the taking of physical custody and providing personal care and supervision until a court order for secure or nonsecure custody can be obtained. A juvenile may be taken into temporary custody under the following circumstances:

- (1) A juvenile may be taken into temporary custody by a law-enforcement officer without a court order if grounds exist for the arrest of an adult in identical circumstances under G.S. 15A-401(b).
- (2) A juvenile may be taken into temporary custody without a court order by a law-enforcement officer or a court counselor if there are reasonable grounds to believe that the juvenile is an undisciplined juvenile.
- (3) A juvenile may be taken into temporary custody without a court order by a law-enforcement officer or a Department of Social Services worker if there are reasonable grounds to believe that the juvenile is abused, neglected, or dependent and that the juvenile would be injured or could not be taken into custody if it were first necessary to obtain a court order. If a Department of Social Services worker takes a juvenile into temporary custody under this subdivision, the worker may arrange for the placement, care, supervision, and transportation of the juvenile.
- (4) A juvenile may be taken into custody without a court order by a law-enforcement officer, by a court counselor, by a member of the Black Mountain Center, Alcohol Rehabilitation Center and Juvenile Evaluation Center Joint Security Force established pursuant to G.S. 122C-421, or by personnel of the Division of Youth Services as designated by the Department of Human Resources if there are reasonable grounds to believe the juvenile is an absconder from any State training school or approved detention facility. (1979, c. 815, s. 1; 1985, c. 408, s. 1; 1985 (Reg. Sess., 1986), c. 863, s. 1; 1994, Ex. Sess., c. 27, s. 2.)

Effect of Amendments. — The 1994 Extra Session amendment, effective July 1, 1994, and applicable to offenses committed, or causes of action arising, on or after that date, substituted "the

juvenile" for "he" in subdivision (2) and in the first sentence of subdivision (3), and added the second sentence of subdivision (3).

§ 7A-572. Duties of person taking juvenile into temporary custody.

(a) A person who takes a juvenile into custody without a court order under G.S. 7A-571(1), (2), or (3) shall proceed as follows:

- (1) Notify the juvenile's parent, guardian, or custodian that the juvenile has been taken into temporary custody and advise the parent, guardian, or custodian of the right to be present with the juvenile until a determination is made as to the need for secure or nonsecure custody. Failure to notify the parent that the juvenile is in custody shall not be grounds for release of the juvenile;
- (2) Release the juvenile to the juvenile's parent, guardian, or custodian if the person having the juvenile in temporary custody decides that continued custody is unnecessary. In the case of a juvenile unlawfully absent from school, if continued custody is unnecessary, the person having temporary custody may deliver the juvenile to the juvenile's school or, if the local city or county government and the local school board adopt such a policy, to a place in the local school administrative unit.
- (3) If the juvenile is not released under subsection (b) of this section, the person having temporary custody shall proceed as follows:
 - a. In the case of a juvenile alleged to be delinquent or undisciplined, the person having temporary custody shall request a petition be drawn pursuant to G.S. 7A-561 or if the clerk's office is closed, the magistrate pursuant to G.S. 7A-562. Once the petition has been drawn and verified, the person shall communicate with the intake counselor who shall consider prehearing diversion. If the decision is made to file a petition, the intake counselor shall contact the judge or person delegated authority pursuant to G.S. 7A-573 if other than the intake counselor for a determination of the need for continued custody.
 - b. In the case of a juvenile alleged to be abused, neglected, or dependent, the person having temporary custody shall communicate with the Director of the Department of Social Services who shall consider prehearing diversion. If the decision is made to file a petition, the director shall contact the judge or person delegated authority pursuant to G.S. 7A-573 for a determination of the need for continued custody.
- (4) A juvenile taken into temporary custody under this Article shall not be held for more than 12 hours, or for more than 24 hours if any of the 12 hours falls on a Saturday, Sunday, or legal holiday, unless:

- a. A petition or motion for review has been filed by an intake counselor or the Director of the Department of Social Services, and
- b. An order for secure or nonsecure custody has been entered by a judge.

(b) A person who takes a juvenile into custody under G.S. 7A-571(4) shall, after contacting a judge and receiving an order for secure custody, transport the juvenile to the nearest approved facility providing secure custody. He shall then contact the administrator of the training school or detention facility from which the juvenile absconded, who shall be responsible for returning the juvenile to that facility. (1979, c. 815, s. 1; 1981, c. 335, ss. 1, 2; 1994, Ex. Sess., c. 17, s. 1; c. 27, s. 3.)

Effect of Amendments. — Session Laws 1994, Extra Session, c. 17, s. 1, effective July 1, 1994, added the last sentence of subdivision (a)(2).

Session Laws 1994, Extra Session, c. 27, s. 3, effective July 1, 1994, and applicable to offenses committed, or causes of action arising, on or after that date, substituted "the right" for "his right" in the first sentence of subdivision (a)(1); sub-

stituted "the juvenile's" for "his" in subdivision (a)(2); substituted "subsection (b) of this section" for "subsection (b)" in subdivision (a)(3); substituted "the person having temporary custody" for "he" in subdivisions (a)(3)a. and (a)(3)b.; and substituted "hours, or for more than 24 hours if any of the 12 hours falls on a Saturday, Sunday, or legal holiday" for "hours" in subdivision (a)(4).

§ 7A-574. Criteria for secure or nonsecure custody.

Editor's Note. — Session Laws 1993, c. 561, s. 87 provides that the Department of Human Resources and the Administrative Office of the Courts shall study the issue of secure custody facilities to determine how best to ensure that only those juveniles that meet the criteria set forth in subsections (b) and (c) of this section are placed in secure custody and that the secure custody facilities available are not overcrowded and are as safe as possible for all the juveniles in secure custody. The Department and Administrative Office shall report the results of the study to the 1993 General

Assembly by May 1, 1994, together with any proposals that would be of benefit in ensuring the best and safest use of secure custody.

Session Laws 1993, c. 561, s. 23.1, as added by Session Laws 1994, Extra Session, c. 24, s. 54, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 1993-95 biennium, the textual provisions of this act shall apply only to funds appropriated for and activities occurring during the 1993-95 biennium."

CASE NOTES

Jurisdiction Required. — Subdivision (d) of this section requires that the trial court have jurisdiction before exercising the powers granted thereunder. In re Transp. of Juveniles, 102 N.C. App. 806, 403 S.E.2d 557 (1991).

Cited in In re Guarante, 109 N.C. App. 598, 427 S.E.2d 883 (1993); In re Safriet, 112 N.C. App. 747, 436 S.E.2d 898 (1993).

§ 7A-576. Place of secure or nonsecure custody.**CASE NOTES**

Cited in *In re Guarante*, 109 N.C. App. 598, 427 S.E.2d 883 (1993).

§ 7A-577. Hearing to determine need for continued secure or nonsecure custody.

(a) No juvenile shall be held under a secure custody order for more than five calendar days or under a nonsecure custody order for more than seven calendar days, without a hearing on the merits or a hearing to determine the need for continued custody. A hearing on secure custody conducted under this subsection may not be continued or waived. A hearing on nonsecure custody conducted under this subsection may be continued for up to 10 business days with the consent of the juvenile's parent, guardian, or custodian, and, if appointed, the juvenile's guardian ad litem. In addition, the court may require the consent of additional parties or may schedule the hearing on nonsecure custody despite a party's consent to a continuance. In every case in which an order has been entered by an official exercising authority delegated pursuant to G.S. 7A-573, a hearing to determine the need for continued custody shall be conducted on the day of the next regularly scheduled session of district court in the city or county where the order was entered if such session precedes the expiration of the applicable time period set forth in this subsection: Provided, that if such session does not precede the expiration of the time period, the hearing may be conducted at another regularly scheduled session of district court in the district where the order was entered.

(b) Any juvenile who is alleged to be delinquent shall be advised of the right to have legal representation as provided in G.S. 7A-584 if the juvenile appears without counsel at the hearing.

(c) At a hearing to determine the need for continued custody, the judge shall receive testimony and shall allow the juvenile, and the juvenile's parent, guardian, or custodian an opportunity to introduce evidence, to be heard in their own behalf, and to examine witnesses. The State shall bear the burden at every stage of the proceedings to provide clear and convincing evidence that restraints on the juvenile's liberty are necessary and that no less intrusive alternative will suffice. The judge shall not be bound by the usual rules of evidence at such hearings.

(d) The judge shall be bound by criteria set forth in G.S. 7A-574 in determining whether continued custody is warranted.

(e) The judge shall impose the least restrictive interference with the liberty of a juvenile who is released from secure custody including:

- (1) Release on the written promise of the juvenile's parent, guardian, or custodian to produce the juvenile in court for subsequent proceedings; or
- (2) Release into the care of a responsible person or organization; or

- (3) Release conditioned on restrictions on activities, associations, residence or travel if reasonably related to securing the juvenile's presence in court; or
- (4) Any other conditions reasonably related to securing the juvenile's presence in court.
- (f) If the judge determines that the juvenile meets the criteria in G.S. 7A-574 and should continue in custody, the judge shall issue an order to that effect. The order shall be in writing with appropriate findings of fact. The findings of fact shall include the evidence relied upon in reaching the decision and the purposes which continued custody is to achieve.

(g) Pending a hearing on the merits, further hearings to determine the need for continued secure custody shall be held at intervals of no more than seven calendar days. A subsequent hearing on continued nonsecure custody shall be held within seven business days, excluding Saturdays, Sundays, and legal holidays, of the initial hearing required in subsection (a) of this section and hearings thereafter shall be held at intervals of no more than 30 calendar days.

(g1) Hearings conducted under subsection (g) of this section may be waived as follows:

- (1) In the case of a juvenile alleged to be delinquent, only with the consent of the juvenile, through counsel for the juvenile; and
- (2) In the case of a juvenile alleged to be abused, neglected, or dependent, only with the consent of the juvenile's parent, guardian, or custodian, and, if appointed, the juvenile's guardian ad litem.

The court may require the consent of additional parties or schedule a hearing despite a party's consent to waiver.

(h) Any order authorizing the continued nonsecure custody of a juvenile who is alleged to be abused, neglected, or dependent shall include findings as to whether reasonable efforts have been made to prevent or eliminate the need for placement of the juvenile in custody and may provide for services or other efforts aimed at returning the juvenile home promptly. A finding that reasonable efforts have not been made to prevent or eliminate the need for placement shall not preclude the entry of an order authorizing continued nonsecure custody when the court finds that continued nonsecure custody is necessary for the protection of the juvenile. Where efforts to prevent the need for the juvenile's placement were precluded by an immediate threat of harm to the juvenile, the court may find that the placement of the juvenile in the absence of such efforts was reasonable. (1979, c. 815, s. 1; 1981, c. 469, s. 13; 1987 (Reg. Sess., 1988), c. 1090, s. 4; 1994, Ex. Sess., c. 27, s. 1.)

Effect of Amendments. —

The 1994 Extra Session amendment, effective July 1, 1994, and applicable to offenses committed, or causes of action arising, on or after that date, in subsection (a) in the first sentence inserted "secure" following "No juvenile shall be held under a," inserted "or under a nonsecure custody order for more than seven calendar days," added the present second, third, and fourth sentences, in

the fifth sentence substituted "applicable time period set forth in this subsection" for "five calendar day period" and substituted "time period" for "five calendar period"; in subsection (b) substituted "the right to have legal representation" for "his right to have an attorney represent him," substituted "the juvenile" for "he" preceding "appears"; substituted "the juvenile's parent" for "his parent" in subsection (c); substituted "the juve-

nile" for "him" in subdivision (e)(1); substituted "the judge" for "he" in subsection (f); in subsection (g) inserted "se-

cure" preceding "custody" and added the second sentence; and added subsection (g1).

CASE NOTES

Hearing on five petitions alleging abuse, neglect, and/or dependency was clearly denominated a hearing to determine the need for continued custody. The judge therefore had the discretion to either continue nonsecure custody or to return the children to their home; he did not have the authority to dismiss the petitions because in so doing

he made an unauthorized determination of the merits of the case. There is no express statutory authority allowing the judge to dismiss the petitions at a five-day hearing. In re Guarante, 109 N.C. App. 598, 427 S.E.2d 883 (1993).

Cited in In re Safriet, 112 N.C. App. 747, 436 S.E.2d 898 (1993).

ARTICLE 47.

Basic Rights.

§ 7A-586. Appointment and duties of guardian ad litem.

(a) When in a petition a juvenile is alleged to be abused or neglected, the judge shall appoint a guardian ad litem to represent the juvenile. When a juvenile is alleged to be dependent, the judge may appoint a guardian ad litem to represent the juvenile. The guardian ad litem and attorney advocate have standing to represent the juvenile in all actions under this Subchapter where they have been appointed. The appointment shall be made pursuant to the program established by Article 39 of this Chapter unless representation is otherwise provided pursuant to G.S. 7A-491 or G.S. 7A-492. In every case where a nonattorney is appointed as a guardian ad litem, an attorney shall be appointed in the case in order to assure protection of the child's legal rights within the proceeding. The duties of the guardian ad litem shall be to make an investigation to determine the facts, the needs of the juvenile, and the available resources within the family and community to meet those needs; to facilitate, when appropriate, the settlement of disputed issues; to offer evidence and examine witnesses at adjudication; to explore options with the judge at the dispositional hearing; and to protect and promote the best interest of the juvenile until formally relieved of the responsibility by the judge.

(b) The judge may order the Department of Social Services or the guardian ad litem to conduct follow-up investigations to insure that the orders of the court are being properly executed and to report to the court when the needs of the juvenile are not being met. The judge may also authorize the guardian ad litem to accompany the juvenile to court in any criminal action wherein he may be called on to testify in a matter relating to abuse.

(c) The judge may grant the guardian ad litem the authority to demand any information or reports whether or not confidential, that may in the guardian ad litem's opinion be relevant to the case. Neither the physician-patient privilege nor the husband-wife privilege may be invoked to prevent the guardian ad litem and the court from obtaining such information. The confidentiality of the infor-

mation or reports shall be respected by the guardian ad litem and no disclosure of any information or reports shall be made to anyone except by order of the judge or unless otherwise provided by law in Chapter 7A. (1979, c. 815, s. 1; 1981, c. 528; 1983, c. 761, s. 159; 1987 (Reg. Sess., 1988), c. 1090, s. 5; 1993, c. 537, s. 1.)

Effect of Amendments. —

The 1993 amendment, effective January 1, 1994, and applicable to petitions filed and requests for information made on or after that date, inserted the subsection designations, inserted the second

sentence of subsection (a), inserted "to offer evidence and examine witnesses at adjudication" in the last sentence of subsection (a), and added "or unless otherwise provided by law in Chapter 7A" in the last sentence of subsection (c).

§ 7A-588. Payment of court appointed attorney or guardian ad litem.

An attorney or guardian ad litem appointed pursuant to G.S. 7A-584, 7A-586 or 7A-587 of this Article, pursuant to any other provision of the Juvenile Code, or pursuant to G.S. 7A-289.23 shall be paid a reasonable fee fixed by the court in the same manner as fees for attorneys appointed in cases of indigency or by direct engagement for specialized guardian ad litem services through the Administrative Office of the Courts. The judge may require payment of the attorney or guardian ad litem fee from a person other than the juvenile as provided in G.S. 7A-450.1, 7A-450.2 and 7A-450.3. In no event shall the parent or guardian be required to pay the fees for an appointed attorney or guardian ad litem in an abuse, neglect, or dependency proceeding unless the juvenile has been adjudicated to be abused, neglected, or dependent, or, in a proceeding to terminate parental rights, unless the parent's rights have been terminated. A person who does not comply with the court's order of payment may be punished for contempt as provided in G.S. 5A-21. (1979, c. 815, s. 1; 1983, c. 726, ss. 2, 3; 1987 (Reg. Sess., 1988), c. 1090, s. 6; 1991, c. 575, s. 1.)

Editor's Note. —

Session Laws 1991, c. 575, which amended this section, in s. 2, effective July 8, 1991, provides: "The Director of the Administration Office of the Courts is authorized to enact a pilot program, in accordance with the provisions of this section, in three judicial districts selected by the Director with the approval of the senior resident superior court judge and the chief district court judge of each district. To facilitate the processing of all cases, the Director shall, in the three pilot areas, engage the services of a particular attorney or attorneys to provide specialized representation to indigent persons on a full-time or part-time

basis. The Administrative Office of the Courts shall file a written evaluation of the pilot program with the General Assembly on or before May 1, 1993. The pilot program shall terminate on June 30, 1993."

Effect of Amendments. —

The 1991 amendment, effective October 1, 1991, and applicable to cases filed on or after October 1, 1991, in the first sentence, deleted "or" following "Article", inserted ", or pursuant to G.S. 7A-289.23", and in the third sentence added "or, in a proceeding to terminate parental rights, unless the parent's rights have been terminated".

ARTICLE 48.

*Law-Enforcement Procedures in Delinquency Proceedings.***§ 7A-594. Role of the law-enforcement officer.**

CASE NOTES

Cited in *State v. Gaines*, 332 N.C. 461, 421 S.E.2d 569 (1992).

§ 7A-595. Interrogation procedures.

CASE NOTES

Admission of Statement of Juvenile. — Although the trial record did not contain the findings required by subsection (d), admission of defendant's statement at trial was not prejudicial because it was not inculpatory. It merely gave somewhat differing versions of the defendant's whereabouts on the day in question. *State v. Small*, 328 N.C. 175,

400 S.E.2d 413 (1991).

The purpose of the requirement in subsection (d) is to establish the basis for admitting the statement. *State v. Small*, 328 N.C. 175, 400 S.E.2d 413 (1991).

Cited in *State v. Hester*, 330 N.C. 547, 411 S.E.2d 610 (1992).

§ 7A-601. Destruction of records resulting from nontestimonial identification procedures.

The results of any nontestimonial identification procedures shall be retained or disposed of as follows:

- (1) If a petition is not filed against a juvenile who has been the subject of nontestimonial identification procedures, all records of the evidence shall be destroyed.
- (2) If in the district court or superior court pursuant to a transfer a juvenile is found not guilty, all records resulting from a nontestimonial order shall be destroyed. Further, in the case of a juvenile who is under 13 years of age and who is adjudicated to have committed a delinquent act, which would be less than a felony had the juvenile been an adult, all records shall be destroyed.
- (3) If a juvenile 13 years of age or older is found to have committed a delinquent act that would be a felony if committed by an adult, all records resulting from a nontestimonial order may be retained in the court file. Special precautions shall be taken to ensure that these records will be maintained in such a manner and under such safeguards as to limit their use to inspection for comparison purposes by law-enforcement officers only in the investigation of a crime.
- (4) If the juvenile is transferred to superior court, all records resulting from nontestimonial identification procedures shall be processed as in the case of an adult.

- (5) Any evidence seized pursuant to a nontestimonial order shall be retained by law-enforcement officers until further order is entered by the court.
- (6) Destruction of nontestimonial identification records pursuant to this section shall be performed by the law-enforcement agency having possession of such records. Following destruction, the law-enforcement agency shall make written certification to the court of the destruction. (1979, c. 815, s. 1; 1994, Ex. Sess., c. 22, s. 28.)

Editor's Note. — Session Laws 1994, Extra Session, c. 22, which amended this section, in s. 1 provides: "This act shall be known as the Crime Control Act of 1994."

Effect of Amendments. — The 1994 Extra Session amendment, effective May 1, 1994, and applicable to offenses committed on or after that date, substi-

tuted "the evidence" for "such evidence" in subdivision (1); substituted "13 years of age" for "14 years of age" in subdivisions (2) and (3); substituted "that would be a felony" for "which would be a felony" in subdivision (3); and substituted "the destruction" for "such destruction" in subdivision (6).

§ 7A-602. (Effective October 1, 1994 — See editor's note) Penalty for willful violation.

Any person who willfully violates provisions of this Article which prohibit conducting nontestimonial identification procedures without an order issued by a judge shall be guilty of a Class 1 misdemeanor. (1979, c. 815, s. 1; 1993, c. 539, s. 5; 1994, Ex. Sess., c. 24, s. 14(c).)

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected

by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Effect of Amendments. — The 1993 amendment, effective October 1, 1994, and applicable to offenses occurring on or after that date, inserted "Class 1" preceding "misdemeanor".

ARTICLE 49.

Transfer to Superior Court.

§ 7A-608. Transfer of jurisdiction of juvenile to superior court.

The court after notice, hearing, and a finding of probable cause may transfer jurisdiction over a juvenile to superior court if the juvenile was 13 years of age or older at the time the juvenile allegedly committed an offense that would be a felony if committed by an adult. If the alleged felony constitutes a Class A felony and the court finds probable cause, the court shall transfer the case to the superior court for trial as in the case of adults. (1979, c. 815, s. 1; 1991 (Reg. Sess., 1992), c. 842, s. 1; 1994, Ex. Sess., c. 22, s. 25.)

Cross References. — As to persons under the age of 17 who commit murder, see § 14-17. As to punishment for persons under the age of seventeen who are convicted of murder, see § 14-17.

Editor's Note. — Session Laws 1994, Extra Session, c. 22, which amended this section, in s. 1 provides: "This act shall be known as the Crime Control Act of 1994."

Session Laws 1994, Extra Session, c. 22, s. 29 authorizes the Juvenile Code Committee of the Legislative Research Commission to study the issue of whether district courts should be mandated to transfer jurisdiction of certain juveniles to Superior Court for trial as in the case of adults, and provides for sub-

mission of a final report to the 1995 General Assembly.

Effect of Amendments. — The 1991 (Reg. Sess., 1992) amendment, effective October 1, 1992, and applicable to offenses committed on and after that date, substituted "Class A felony" for "capital offense" in the second sentence.

The 1994 Extra Session amendment, effective May 1, 1994, and applicable to offenses committed on or after that date, deleted "14 years of age or older" preceding "to superior court," substituted "13 years of age" for "14 years of age," substituted "the juvenile" for "he" preceding "allegedly," substituted "that" for "which" preceding "would be a felony," and twice substituted "court" for "judge."

§ 7A-609. Probable-cause hearing.

(a) The court shall conduct a hearing to determine probable cause in all felony cases in which a juvenile was 13 years of age or older when the offense was allegedly committed. Counsel for the juvenile may waive in writing the right to the hearing and stipulate to a finding of probable cause. The court may exclude the public from the hearing unless the juvenile moves that the hearing be open, which motion shall be granted.

(b) At the probable-cause hearing,

- (1) A prosecutor must represent the State;
- (2) The juvenile shall be represented by counsel in accordance with G.S. 7A-584;
- (3) The juvenile may testify as a witness in his own behalf and call and examine other witnesses and produce other evidence in his behalf; and
- (4) Each witness must testify under oath or affirmation and be subject to cross-examination.

(c) The State must by nonhearsay evidence, or by evidence that satisfies an exception to the hearsay rule, show that there is probable cause to believe that the offense charged has been committed and that there is probable cause to believe that the juvenile committed it, except:

- (1) A report or copy of a report made by a physicist, chemist, firearms identification expert, fingerprint technician, or an expert or technician in some other scientific, professional, or medical field, concerning the results of an examination, comparison, or test performed by him in connection with the case in issue, when stated by that person in a report made by him, is admissible in evidence;
- (2) If there is no serious contest, reliable hearsay is admissible to prove value, ownership of property, possession of property in another than the juvenile, lack of consent of the owner, possessor, or custodian of property to the breaking or entering of premises, chain of custody, and authenticity of signatures.

(d) The juvenile's attorney has the right to examine any court or probation records considered by the court in exercising its discre-

tion to transfer the case. (1979, c. 815, s. 1; 1981, c. 469, ss. 15, 16; 1994, Ex. Sess., c. 22, s. 26.)

Editor's Note. — Session Laws 1994, Extra Session, c. 22, which amended this section, in s. 1 provides: "This act shall be known as the Crime Control Act of 1994."

Effect of Amendments. — The 1994 Extra Session amendment, effective May 1, 1994, and applicable to offenses committed on or after that date, in sub-

section (a) twice substituted "court" for "judge," substituted "13 years of age" for "14 years of age," substituted "committed. Counsel for the juvenile may waive in writing the right" for "committed unless counsel for the juvenile waives in writing his right," and substituted "stipulate" for "stipulates."

§ 7A-610. Procedure upon finding of probable cause.

(a) If probable cause is found and transfer to superior court is not required by G.S. 7A-608, the prosecutor or the juvenile may move that the case be transferred to the superior court for trial as in the case of adults. The judge may proceed to determine whether the needs of the juvenile or the best interest of the State will be served by transfer of the case to superior court for trial as in the case of adults. When the case is transferred to superior court, the superior court has jurisdiction over that felony, any offense based on the same act or transaction or on a series of acts or transactions connected together or constituting parts of a single scheme or plan of that felony, and any greater or lesser included offense of that felony.

(b) If probable cause is not found, the judge shall dismiss the proceeding.

(c) Any order of transfer shall specify the reasons for transfer.

(d) A finding of no probable cause shall not preclude the judge from adjudicating the juvenile delinquent for the commission of a lesser included offense. (1979, c. 815, s. 1; 1983, c. 532, s. 1; 1994, Ex. Sess., c. 22, s. 27.)

Editor's Note. — Session Laws 1994, Extra Session, c. 22, which amended this section, in s. 1 provides: "This act shall be known as the Crime Control Act of 1994."

Effect of Amendments. — The 1994 Extra Session amendment, effective May 1, 1994, and applicable to offenses

committed on or after that date, in subsection (a) substituted "found and transfer to superior court is not required by G.S. 7A-608" for "found" in the first sentence, and substituted "The" for "If the alleged felony does not constitute a capital offense, the" in the second sentence.

§ 7A-611. Right to pretrial release; detention.

Once the order of transfer has been entered, the juvenile has the right to pretrial release as provided in G.S. 15A-533 and 15A-534. The release order shall specify the person or persons to whom the juvenile may be released. Pending release under this Article, the judge shall order that the juvenile be detained in a local detention home as defined by G.S. 7A-517(15) or a regional detention home as defined by G.S. 7A-517(26) while awaiting trial. The judge may order the juvenile to be held in a holdover facility as defined by G.S. 7A-517(16) at any time the presence of the juvenile is required in court for pretrial hearings or trial, if the judge finds that it would

be inconvenient to return the juvenile to the local or regional detention home.

Should the juvenile be found guilty, or enter a plea of guilty or no contest to criminal offenses in superior court and the juvenile receives an active sentence, then immediate transfer to the Department of Correction shall be ordered. Until such time as the juvenile is transferred to the Department of Correction, the juvenile may be detained in a holdover facility as defined by G.S. 7A-517(16). The juvenile may not be detained in a local detention home as defined by G.S. 7A-517(15) or a regional detention home as defined by G.S. 517(26) [G.S. 7A-517(26)] pending transfer to the Department of Correction. The juvenile may be kept by the Department of Correction as a safekeeper until the juvenile is placed in an appropriate correctional program. (1979, c. 815, s. 1; 1987, c. 144; 1991, c. 352, s. 1.)

Effect of Amendments. —

The 1991 amendment, effective October 1, 1991, and applicable to pretrial

release orders issued on and after October 1, 1991, added the second sentence of the first paragraph.

ARTICLE 51.

Hearing Procedures.

§ 7A-627. Amendment of petition.

CASE NOTES

Construction. — The North Carolina Supreme Court construed this section to permit a juvenile petition to be amended only if the amended petition does not

charge the juvenile with a different offense. In re Davis, 114 N.C. App. 253, 441 S.E.2d 696 (1994).

§ 7A-631. Conduct of hearing.

CASE NOTES

I. General Consideration.

I. GENERAL CONSIDERATION.

When a parent is absent from a termination proceeding and the trial court preserves the adversarial nature of the proceeding by allowing the parent's counsel to cross examine witnesses, with the questions and answers being recorded, the parent must demonstrate some actual prejudice in order to prevail

upon appeal. In re Murphy, 105 N.C. App. 651, 414 S.E.2d 396, aff'd, 332 N.C. 663, 422 S.E.2d 577 (1992).

A motion to dismiss a juvenile petition is recognized by North Carolina statutory and case law. In re Grubb, 103 N.C. App. 452, 405 S.E.2d 797 (1991); In re J.A., 103 N.C. App. 720, 407 S.E.2d 873 (1991).

§ 7A-632. Continuances.

CASE NOTES

Quoted in *In re Safriet*, 112 N.C. App. 747, 436 S.E.2d 898 (1993).

§ 7A-633. When admissions by juvenile may be accepted.

CASE NOTES

Court which initially adjudged the juvenile to be delinquent erred in accepting the juvenile's admission. In

re Kenyon N., 110 N.C. App. 294, 429 S.E.2d 447 (1993).

§ 7A-635. Quantum of proof in adjudicatory hearing.

CASE NOTES

The evidence before the trial court was sufficient to support its findings of abuse and neglect where: (1) Child, while in respondent's sole care, suffered multiple burns over a wide portion of her body; (2) no accidental cause was established, and the child in fact stated that respondent burned her; (3) the burns were serious, requiring prompt medical attention; (4) respondent did not seek treatment for the child's injuries and refused to permit social worker to do so; and (5) the child was taken for treatment only upon the intervention of the

sheriff's department, over respondent's opposition. In *re Hayden*, 96 N.C. App. 77, 384 S.E.2d 558 (1989).

A finding of neglect by clear and convincing evidence was proper where the children were kept at home, and they did not receive proper medical care, supervision, or adequate nutrition. In *re Bell*, 107 N.C. App. 566, 421 S.E.2d 590, appeal withdrawn, 333 N.C. 168, 426 S.E.2d 699 (1992).

Cited in *In re Krauss*, 102 N.C. App. 112, 401 S.E.2d 123 (1991).

ARTICLE 52.

Dispositions.

§ 7A-646. Purpose.

CASE NOTES

Applied in *In re Safriet*, 112 N.C. App. 747, 436 S.E.2d 898 (1993).

Quoted in *In re Kennedy*, 103 N.C. App. 632, 406 S.E.2d 307 (1991); In *re*

Doe, 329 N.C. 743, 407 S.E.2d 798 (1991).

Cited in *In re Bell*, 107 N.C. App. 566, 421 S.E.2d 590 (1992).

§ 7A-647. Dispositional alternatives for delinquent, undisciplined, abused, neglected, or dependent juvenile.

The following alternatives for disposition shall be available to any judge exercising jurisdiction, and the judge may combine any of the applicable alternatives when he finds such disposition to be in the best interest of the juvenile:

- (1) The judge may dismiss the case, or continue the case in order to allow the juvenile, parent, or others to take appropriate action.
- (2) In the case of any juvenile who needs more adequate care or supervision or who needs placement, the judge may:
 - a. Require that he be supervised in his own home by the Department of Social Services in his county, a court counselor or other personnel as may be available to the court, subject to conditions applicable to the parent or the juvenile as the judge may specify; or
 - b. Place him in the custody of a parent, relative, private agency offering placement services, or some other suitable person; or
 - c. Place him in the custody of the Department of Social Services in the county of his residence, or in the case of a juvenile who has legal residence outside the State, in the physical custody of the Department of Social Services in the county where he is found so that agency may return the juvenile to the responsible authorities in his home state. The Director may, unless otherwise ordered by the judge, arrange for, provide, or consent to, needed routine or emergency medical or surgical care or treatment. In the case where the parent is unknown, unavailable or unable to act on behalf of their child or children, the Director may, unless otherwise ordered by the judge, arrange for, provide or consent to any psychiatric, psychological, educational, or other remedial evaluations or treatment for the juvenile placed by a judge or his designee in the custody or physical custody of a county Department of Social Services under the authority of this or any other Chapter of the General Statutes. Prior to exercising this authority, the Director shall make reasonable efforts to obtain consent from a parent or guardian of the affected child. If the Director can not obtain such consent, the Director shall promptly notify the parent or guardian that care or treatment has been provided and shall give him frequent status reports on the circumstances of the child. Upon request of a parent or guardian of the affected child, the results or records of the aforementioned evaluations, findings or treatment shall be made available to such parent or guardian by the Director unless prohibited by G.S. 122C-53(d).
- (3) In any case, the judge may order that the juvenile be examined by a physician, psychiatrist, psychologist or other qualified expert as may be needed for the judge to determine the needs of the juvenile. If the judge finds the juve-

nile to be in need of medical, surgical, psychiatric, psychological or other treatment, he shall allow the parent or other responsible persons to arrange for care. If the parent declines or is unable to make necessary arrangements, the judge may order the needed treatment, surgery or care, and the judge may order the parent to pay the cost of such care pursuant to G.S. 7A-650. If the judge finds the parent is unable to pay the cost of care, the judge may charge the cost to the county. If the judge believes, or if there is evidence presented to the effect that the juvenile is mentally ill or is mentally retarded the judge shall refer him to the area mental health, developmental disabilities, and substance abuse director for appropriate action. A juvenile shall not be committed directly to a State hospital or mental retardation center; and orders purporting to commit a juvenile directly to a State hospital or mental retardation center except for an examination to determine capacity to proceed shall be void and of no effect. The area mental health, developmental disabilities, and substance abuse director shall be responsible for arranging an interdisciplinary evaluation of the juvenile and mobilizing resources to meet his needs. If institutionalization is determined to be the best service for the juvenile, admission shall be with the voluntary consent of the parent or guardian. If the parent, guardian, or custodian refuses to consent to a mental hospital or retardation center admission after such institutionalization is recommended by the area mental health, developmental disabilities, and substance abuse director, the signature and consent of the judge may be substituted for that purpose. In all cases in which a regional mental hospital refuses admission to a juvenile referred for admission by a judge and an area mental health, developmental disabilities, and substance abuse director or discharges a juvenile previously admitted on court referral prior to completion of his treatment, the hospital shall submit to the judge a written report setting out the reasons for denial of admission or discharge and setting out the juvenile's diagnosis, indications of mental illness, indications of need for treatment, and a statement as to the location of any facility known to have a treatment program for the juvenile in question. (1979, c. 815, s. 1; 1981, c. 469, s. 19; 1985, c. 589, s. 5; c. 777, s. 1; 1985 (Reg. Sess., 1986), c. 863, s. 2; 1991, c. 636, s. 19(a).)

Effect of Amendments. — The 1991 amendment, effective July 11, 1991, substituted "area mental health, developmental disabilities, and substance abuse director" for "area mental health, mental retardation, and substance

abuse director" throughout subdivision (3).

Legal Periodicals. —

For article, "Mental Health Care for Children: Before and During State Custody," see 13 Campbell L. Rev. 1 (1990).

CASE NOTES

The medical evaluation of juveniles is of critical importance in proceedings involving allegations of abuse and neglect under the Juvenile Code (§ 7A-516, et seq.). In re Hayden, 96 N.C. App. 77, 384 S.E.2d 558 (1989).

Authority to Place Child in Custody, etc. —

In accord with the main volume. See In re Kennedy, 103 N.C. App. 632, 406 S.E.2d 307 (1991).

Reasonable and Available Non-Statutory Alternatives. — Prior to committing a juvenile to the Division of Youth Services, the court must also consider any reasonable and available non-statutory community-level alternatives. In re Mosser, 99 N.C. App. 523, 393 S.E.2d 308 (1990).

Failure to Order Psychiatric Examination Precluded Commitment.

— Where finding that juvenile was manic-depressive was supported only by a statement made to trial court by mother of the juvenile, this evidence of mental illness compelled further inquiry by trial court prior to entry of any final disposition; however, while trial court had authority to order a psychiatric examination of juvenile and gain advice of a medical specialist, he failed to utilize this community resource and such failure precludes commitment to the Division of Youth Services. In re Mosser, 99 N.C. App. 523, 393 S.E.2d 308 (1990).

This Section Presents Alternatives for Disposition in Addition to Those in § 7A-649. — This section which is to

be read in tandem with § 7A-649, presents several other community-based dispositional alternatives for delinquent juveniles. In re Randall, 99 N.C. App. 356, 393 S.E.2d 121 (1990).

Power to Order Sex Offender Treatment. — The district court had power to order the Department of Human Resources, Division of Youth Services to give sex offender treatment to an adolescent found delinquent because of sex offenses and subsequently to deny the conditional release of that adolescent because treatment had not been in compliance with that mandate. In re Doe, 329 N.C. 743, 407 S.E.2d 798 (1991).

The district court is authorized to permit the Division of Youth Services, as the "person" responsible for a juvenile in its custody, to arrange for psychological counseling for sexual offenders. When the agency, as custodian, fails to make such arrangements, the court is authorized by statute to "order the needed treatment." In re Doe, 329 N.C. 743, 407 S.E.2d 798 (1991).

Ordering Division of Youth Services to provide specific treatment for sexual offenders for a delinquent juvenile in its custody, when such treatment was available, was within the scope of the court's statutory authority. In re Doe, 329 N.C. 743, 407 S.E.2d 798 (1991).

Applied in In re Safriet, 112 N.C. App. 747, 436 S.E.2d 898 (1993).

Cited in In re Phillips, 99 N.C. App. 159, 392 S.E.2d 407 (1990).

§ 7A-648. Dispositional alternatives for delinquent or undisciplined juvenile.

Editor's Note. — Session Laws 1993, c. 47, effective October 1, 1993, establishes a pilot program to be administered by the administrative Office of the Courts to expand juvenile court jurisdiction in Catawba, Bertie, and McDowell counties to include as undisciplined juveniles those juveniles at least 16 years of age and under 18 years of age who are beyond the disciplinary control of their parents. For the duration of the pilot, an undisciplined juvenile includes a juvenile at least 16 years of age and less than 18 years of age who is beyond the

disciplinary control of his parent, guardian, or custodian. The purpose of the pilot program is to determine whether juvenile court jurisdiction should be broadened to include such juveniles on a statewide basis. The Administrative Office of the Courts shall evaluate the pilot and file a report on the pilot with the General Assembly on or before the convening of the 1995 Session. The pilot shall terminate April 1, 1995, and shall be conducted within existing funds of the Administrative Office of the Courts.

CASE NOTES

Reasonable and Available Non-statutory Alternatives. — Prior to committing a juvenile to the Division of Youth Services, the court must also con-

sider any reasonable and available non-statutory community-level alternatives. In re Mosser, 99 N.C. App. 523, 393 S.E.2d 308 (1990).

§ 7A-649. Dispositional alternatives for delinquent juvenile.

In the case of any juvenile who is delinquent, the judge may:

- (1) Suspend imposition of a more severe, statutorily permissible disposition with the provision that the juvenile meet certain conditions agreed to by him and specified in the dispositional order. The conditions shall not exceed the maximum criminal sanction permissible for the offense;
- (2) Require restitution, full or partial, payable within a 12-month period to any person who has suffered loss or damage as a result of the offense committed by the juvenile. The judge may determine the amount, terms, and conditions of the restitution. If the juvenile participated with another person or persons, all participants should be jointly and severally responsible for the payment of restitution; however, the judge shall not require the juvenile to make restitution if the juvenile satisfies the court that he does not have, and could not reasonably acquire, the means to make restitution;
- (3) Impose a fine related to the seriousness of the juvenile's offense. If the juvenile has the ability to pay the fine, it shall not exceed the maximum fine for the offense if committed by an adult;
- (4) Order the juvenile to perform supervised community service consistent with the juvenile's age, skill, and ability, specifying the nature of the work and the number of hours required. The work shall be related to the seriousness of the juvenile's offense and in no event may the obligation to work exceed 12 months;
- (5) Order the juvenile to a supervised day program, requiring him to be present at a specified place for all or part of every day or of certain days. The judge also may require the juvenile to comply with any other reasonable conditions specified in the dispositional order that are designed to facilitate supervision;
- (6) Order the juvenile to a community-based program of academic or vocational education or to a professional residential or nonresidential treatment program. Participation in the programs shall not exceed 12 months;
- (7) Impose confinement on an intermittent basis in an approved detention facility. Confinement shall be limited to not more than five 24-hour periods, the timing of which is determined by the court in its discretion. Confinement in such a case shall be completed within a period of 90 days from the date of disposition;
- (8) **(Effective until October 1, 1995)** Place the juvenile on probation under the supervision of a court counselor. In any case where a juvenile is placed on probation, the court

§ 7A-649(8) is set out twice. See notes.

counselor shall have the authority to visit the juvenile where the juvenile resides. The judge shall specify conditions of probation that are related to the needs of the juvenile including any of the following:

- a. That the juvenile shall remain on good behavior and not violate any laws.
- b. That the juvenile attend school regularly. If the adjudication of delinquency was for an offense involving a threat to the safety of the juvenile or others and school attendance is a condition of probation, the judge shall make a finding of whether or not the principal of the juvenile's school should be notified. If the judge orders that the principal be notified, the juvenile court counselor shall within five days or before the juvenile begins to attend school, whichever occurs first, notify the principal of the juvenile's school in writing of the nature of the offense and the probation requirements related to school attendance. A principal notified by a juvenile court counselor shall handle the report according to the guidelines and rules adopted by the State Board of Education.
- b1. That the juvenile maintain passing grades in up to four courses during each grading period and meet with the court counselor and a representative of the school to make a plan for how to maintain those passing grades.
- c. That the juvenile not associate with specified persons or be in specified places.
- d. That the juvenile report to a court counselor as often as required by a court counselor.
- e. That the juvenile make specified financial restitution or pay a fine in accordance with subdivisions (2) and (3).
- f. That the juvenile be employed regularly if not attending school.

An order of probation shall remain in force for a period not to exceed one year from the date entered. Prior to expiration of an order of probation, the judge may extend it for an additional period of one year after a hearing if the judge finds that the extension is necessary to protect the community or to safeguard the welfare of the juvenile;

- (8) **(Effective October 1, 1995)** Place the juvenile on probation under the supervision of a court counselor. In any case where a juvenile is placed on probation, the court counselor shall have the authority to visit the juvenile where he resides. The judge shall specify conditions of probation that are related to the needs of the juvenile including any of the following:

- a. That the juvenile shall remain on good behavior and not violate any laws;
- b. That the juvenile attend school regularly;
- b1. That the juvenile maintain passing grades in up to four courses during each grading period and meet with the court counselor and a representative of the school

§ 7A-649(8) is set out twice. See notes.

to make a plan for how to maintain those passing grades;

- c. That the juvenile not associate with specified persons or be in specified places;
- d. That the juvenile report to a court counselor as often as required by a court counselor;
- e. That the juvenile make specified financial restitution or pay a fine in accordance with subdivisions (2) and (3);
- f. That the juvenile be employed regularly if not attending school.

An order of probation shall remain in force for a period not to exceed one year from the date entered. Prior to expiration of an order of probation, the judge may extend it for an additional period of one year after a hearing if he finds that the extension is necessary to protect the community or to safeguard the welfare of the juvenile;

- (9) Order that the juvenile shall not be licensed to operate a motor vehicle in the State of North Carolina for as long as the court retains jurisdiction over the juvenile or for any shorter period of time;
- (10) Commit the juvenile to the Division of Youth Services in accordance with G.S. 7A-652. (1979, c. 815, s. 1; 1981, c. 469, s. 20; 1991, c. 353, s. 1; 1991 (Reg. Sess., 1992), c. 1030, s. 4; 1993, c. 369, s. 1; c. 462, s. 1.)

Subdivision (8) Set Out Twice. —

The first version of subdivision (8) set out above is effective until October 1, 1995. The second version of subdivision (8) set out above is effective October 1, 1995.

Editor's Note. — Session Laws 1993, c. 369, which amended this section, in s. 2 provides: "The Administrative Office of the Courts shall report to the Joint Legislative Education Oversight Committee on the number of juveniles reported to principals in accordance with this act no later than January 1, 1995", and in s. 3 provides that the act expires October 1, 1995.

Session Laws 1994, Extra Session, c. 24, s. 34 appropriates from the funds appropriated in c. 24 to the Department of Human Resources, Division of Youth Services, the sum of one hundred twenty-five thousand dollars (\$125,000) for the 1993-94 fiscal year and the sum of five hundred thousand dollars (\$500,000) for the 1994-95 fiscal year to establish the Alternatives to Detention Program in selected district court judicial districts that do not currently have them. It further provides that the Department of Human Resources shall perform an evaluation of how the expanded Alternatives to Detention Program af-

fects admission to juvenile detention facilities and report the results of this evaluation to the General Assembly by March 1, 1995.

Session Laws 1994, Extra Session, c. 24, s. 70, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 1993-95 biennium, the textual provisions of this act shall apply only to funds appropriated for and activities occurring during the 1993-95 biennium."

Effect of Amendments. — The 1991 amendment, effective October 1, 1991, and applicable to dispositions ordered on and after October 1, 1991, in subdivision (7) in the second sentence inserted "not more than five 24-hour periods, the timing of which is determined by the court in its discretion", repealed subdivisions (7)a and (7)b, which read "a. Night custody for no more than a total of five nights; or b. Weekend custody for no more than a total of two weekends," and substituted "90" for "60" in the last sentence of subdivision (7).

The 1991 (Reg. Sess., 1992) amendment, effective July 24, 1992, in subdivision (7) deleted the repealed line for former subdivisions (a) and (b), and substituted "such a case" for "either case" in the last sentence.

Session Laws 1993, c. 369, s. 1, effective October 1, 1993, and applicable to delinquent acts committed on or after that date, in subsection (8), substituted "the juvenile" for "he" in the second sentence; added the language following the present first sentence in subdivision (8)(a); and substituted "the judge" for "he" following "one year after a hearing if" toward the end of the subsection. Ses-

sion Laws 1993, c. 369, s. 1, expires October 1, 1995.

Session Laws 1993, c. 462, s. 1, effective October 1, 1993, and applicable to orders of probation for adjudications of delinquency for acts committed on or after that date, in subdivision (8) substituted "following" for "following which apply", and added subdivision (8)b1.

CASE NOTES

A wide variety of dispositional alternatives is presented in the Juvenile Code (§ 7A-516, et seq.), and the trial judge is free to fashion others in harmony with the individual child's needs. In re Groves, 93 N.C. App. 34, 376 S.E.2d 481 (1989).

Court Must Consider Pertinent Factors Prior to Commitment. — Where trial court's findings did not sufficiently address needs of the juvenile, such as medical or psychological evaluation, school records, home evaluation, or a history of parental neglect, and the court's order did not contain sufficient findings as to community resources that might be appropriate as noncustodial alternatives to commitment, case would be remanded for further consideration of these pertinent factors. In re Cousin, 93 N.C. App. 224, 377 S.E.2d 275 (1989).

Reasonable and Available Non-statutory Alternatives. — Prior to committing a juvenile to the Division of Youth Services, the court must also con-

sider any reasonable and available non-statutory community-level alternatives. In re Mosser, 99 N.C. App. 523, 393 S.E.2d 308 (1990).

Section 7A-647 Presents Alternatives for Disposition in Addition to Those in This Section. — Section 7A-647, which is to be read in tandem with this section, presents several other community-based dispositional alternatives for delinquent juveniles. In re Randall, 99 N.C. App. 356, 393 S.E.2d 121 (1990).

Seriousness of Offense Cannot Be Sole Basis for Commitment. — A juvenile may not be committed to training school based upon the perceived seriousness of the offense alone. In re Randall, 99 N.C. App. 356, 393 S.E.2d 121 (1990), citing In re Khork, 71 N.C. App. 151, 321 S.E.2d 487 (1984).

Stated in In re Doe, 329 N.C. 743, 407 S.E.2d 798 (1991).

Cited in In re Kenyon N., 110 N.C. App. 294, 429 S.E.2d 447 (1993).

§ 7A-651. Dispositional order.

(a) The dispositional order shall be in writing and shall contain appropriate findings of fact and conclusions of law. The judge shall state with particularity, both orally and in the written order of disposition, the precise terms of the disposition including the kind, duration and the person who is responsible for carrying out the disposition and the person or agency in whom custody is vested.

(b) A dispositional order under which a juvenile is removed from the custody of a parent or person standing in loco parentis shall direct that the review hearing required by G.S. 7A-657 be held within six months of the date of the juvenile's placement in custody and, if practicable, shall set the date and time for the review hearing.

(c) Any order directing placement of a juvenile in foster care shall also contain:

- (1) A finding that the juvenile's continuation in or return to his own home would be contrary to the juvenile's best interest; and
- (2) Findings as to whether reasonable efforts have been made to prevent or eliminate the need for placement of the juvenile.

nile in foster care. A finding that reasonable efforts were not made to prevent or eliminate the need for placement shall not preclude entry of a dispositional order authorizing placement in foster care when the court finds that such placement is needed for protection of the juvenile. When efforts to prevent the need for the juvenile's placement are precluded by an immediate threat of harm to the juvenile, the court may find that placement of the juvenile in the absence of such efforts is reasonable.

The order may provide for services or other efforts aimed at returning the juvenile home.

(d) An order that places a juvenile in the custody of a county department of social services for placement shall specify that the juvenile's placement and care are the responsibility of the county department of social services and that the county department is to provide or arrange for the foster care or other placement of the juvenile.

(e) An order that commits a juvenile to the Division of Youth Services shall recite detailed findings that support commitment to the Division as the least restrictive alternative in light of the circumstances. These findings shall state that all alternatives to commitment prescribed in G.S. 7A-647, 7A-648, and 7A-649 have been attempted unsuccessfully or were considered and found to be inappropriate and that the juvenile's behavior constitutes a threat to persons or property in the community. These findings shall be supported by substantial evidence in the record that the judge determined the needs of the juvenile, determined the appropriate community resources required to meet those needs, and explored and exhausted or considered inappropriate those resources prior to committing the juvenile to the Division. (1979, c. 815, s. 1; 1987 (Reg. Sess., 1988), c. 1090, s. 10; 1991, c. 434, s. 1.)

Effect of Amendments. —

The 1991 amendment, effective October 1, 1991, and applicable to commit-

ments order or after that date, added subsection (e).

§ 7A-652. Commitment of delinquent juvenile to Division of Youth Services.

(a) A delinquent juvenile 10 years of age or more may be committed to the Division of Youth Services for placement in one of the residential facilities operated by the Division if the judge finds that the alternatives to commitment as contained in G.S. 7A-647, 7A-648, and 7A-649 have been attempted unsuccessfully or were considered and found to be inappropriate and that the juvenile's behavior constitutes a threat to persons or property in the community. These findings shall be supported by substantial evidence in the record that the judge determined the needs of the juvenile, determined the appropriate community resources required to meet those needs, and explored and exhausted or considered inappropriate those resources prior to committing the juvenile to the Division.

(b) Commitment shall be for:

- (1) An indefinite term not to exceed the eighteenth birthday of the juvenile; or
- (2) A definite term not to exceed two years if the judge finds that the juvenile is 14 years of age or older, has been previ-

ously adjudicated delinquent for two or more felony offenses, and has been previously committed to a residential facility operated by the Division of Youth Services. The Division may reduce the duration of the definite commitment by an amount not to exceed twenty-five percent (25%) if the juvenile has not committed any major infractions of the regulations of any facility to which he is assigned, and the Division of Youth Services may move for a reduction of more than twenty-five percent (25%) pursuant to G.S. 7A-664.

(c) In no event shall commitment of a delinquent juvenile be for a period of time in excess of that period for which an adult could be committed for the same act. Any juveniles committed for an offense for which an adult would be sentenced for 30 days or less shall be assigned to a local detention home as defined by G.S. 7A-517(15) or a regional home as defined by G.S. 7A-517(26).

(d) The Chief Court Counselor shall have the responsibility for transporting the juvenile to the residential facility designated by the Division of Youth Services. The juvenile shall be accompanied to the residential facility by a person of the same sex.

(d1) The Chief Court Counselor shall insure that the records requested by the Director of Youth Services accompany the juvenile upon transportation for admittance to a training school or, if not obtainable at the time of admission, are sent to the training school within 15 days of the admission. If records requested by the Division of Youth Services for admission do not exist, to the best knowledge of the Chief Court Counselor, he shall so stipulate in writing to the training school. If such records do exist, but the Chief Court Counselor is unable to obtain copies of them, a district court judge may order that the records from public agencies be made available to the training school. Records that are confidential by law shall remain confidential and the Division of Youth Services shall be bound by the specific laws governing the confidentiality of these records. All records shall be used in a manner consistent with the best interest of the juvenile.

(e) The Division of Youth Services shall accept all juveniles who have been committed for delinquency when the order of commitment appears on its face to contain the findings required by G.S. 7A-651(e) but may decline to do so otherwise. A commitment order accompanied by information requested by the Director shall be forwarded to the Division. The Director shall place the juvenile in the residential facility that would best provide for his needs and shall notify the committing court. The Secretary of the Department of Human Resources may assign a juvenile committed for delinquency to any institution or other program of the Department or licensed by the Department, which program is appropriate to the needs of the juvenile.

(f) When the judge commits a juvenile to the Division of Youth Services, the Director shall prepare a plan for care or treatment within 30 days after assuming custody of the juvenile.

(g) Commitment of a juvenile to the Division of Youth Services does not terminate the court's continuing jurisdiction rights over the juvenile and his parent or guardian. Commitment of a juvenile to the Division of Youth Services transfers only physical custody of the juvenile to the Division. Legal custody remains with the parent,

guardian, agency or institution in whom it was vested. (1979, c. 815, s. 1; 1983, c. 133, s. 2; 1987, c. 100; c. 372; 1991, c. 434, ss. 2, 3.)

Effect of Amendments. — The 1991 amendment, effective October 1, 1991, and applicable to commitments order on or after that date, in subsection (a), inserted "7A-647, 7A-648, and," substituted "were considered and found to be" for "are", and added the last sentence;

and in subsection (e), substituted "when the order of commitment appears on its face to contain the findings required by G.S. 7A-651(e) but may decline to do so otherwise" for "if the Director finds that the criteria specified in this section have been met."

CASE NOTES

Reasonable and Available Non-statutory Alternatives. — Prior to committing a juvenile to the Division of Youth Services, the court must also consider any reasonable and available non-statutory community-level alternatives. In re Mosser, 99 N.C. App. 523, 393 S.E.2d 308 (1990).

Seriousness of Offense Cannot Be Sole Basis for Commitment. — A juvenile may not be committed to training school based upon the perceived seriousness of the offense alone. In re Randall, 99 N.C. App. 356, 393 S.E.2d 121 (1990), citing In re Khork, 71 N.C. App. 151, 321 S.E.2d 487 (1984).

Power to Order Sex Offender Treatment. — The district court had power to order the Department of Human Resources, Division of Youth Services to give sex offender treatment to an adolescent found delinquent be-

cause of sex offenses and subsequently to deny the conditional release of that adolescent because treatment had not been in compliance with that mandate. In re Doe, 329 N.C. 743, 407 S.E.2d 798 (1991).

Ordering Division of Youth Services to provide specific treatment for sexual offenders for a delinquent juvenile in its custody, when such treatment was available, was within the scope of the court's statutory authority. In re Doe, 329 N.C. 743, 407 S.E.2d 798 (1991).

Court Authorized to Oversee Plans for Release. — District court was authorized continually to oversee Division of Youth Services' plans for delinquent juvenile's release. In re Doe, 329 N.C. 743, 407 S.E.2d 798 (1991).

Cited in In re Swindell, 326 N.C. 473, 390 S.E.2d 134 (1990); In re Cowles, 108 N.C. App. 74, 422 S.E.2d 443 (1992).

§ 7A-654. Prerelease planning.

CASE NOTES

Cited in In re Doe, 329 N.C. 743, 407 S.E.2d 798 (1991).

§ 7A-655. Conditional release and final discharge.

CASE NOTES

Denial of Conditional Release on Failure to Give Sex Offender Treatment. — The district court had power to order the Department of Human Resources, Division of Youth Services to give sex offender treatment to an adoles-

cent found delinquent because of sex offenses and subsequently to deny the conditional release of that adolescent because treatment had not been in compliance with that mandate. In re Doe, 329 N.C. 743, 407 S.E.2d 798 (1991).

§ 7A-657. Review of custody order.

CASE NOTES

Return of Custody. — This section contemplates that a child may be returned to the parent from whom custody was taken if the trial court finds sufficient facts to show that the child "will receive proper care and supervision" from the parent, and such placement is deemed in the best interest of the child. *In re Isenhour*, 101 N.C. App. 550, 400 S.E.2d 71 (1991).

§ 7A-659. Post termination of parental rights' placement court review.

(a) The purpose of each placement review is to insure that every reasonable effort is being made to provide for a permanent placement plan for the child who has been placed in the custody of a county director or licensed child-placing agency, which is consistent with the child's best interest. At each review hearing the court may consider information from the Department of Social Services, the licensed child-placing agency, the guardian ad litem, the child, the foster parent, and any other person or agency the court determines is likely to aid in the review.

(b) The court shall conduct a placement review not later than six months from the date of the termination hearing when parental rights have been terminated by a petition brought by any person or agency designated in G.S. 7A-289.24(2) through (5) and a county director or licensed child-placing agency has custody of the child. The court shall conduct reviews every six months until the child is placed for adoption and the adoption petition is filed by the adoptive parents.

- (1) No more than 30 days and no less than 15 days prior to each review, the clerk shall give notice of the review to the child if he is at least 12 years of age, the legal custodian of the child, the foster parent, the guardian ad litem, if any, and any other person the court may specify. Only the child if he is at least 12 years of age, the legal custodian of the child, the foster parent, and the guardian ad litem shall attend the review hearings, except as otherwise directed by the court.
- (2) If a guardian ad litem for the child has not been appointed previously by the court in the termination proceeding, the court, at the initial six-month review hearing, may appoint a guardian ad litem to represent the child. The court may continue the case for such time as is necessary for the guardian ad litem to become familiar with the facts of the case.
- (c) The court shall consider at least the following in its review:
 - (1) The adequacy of the plan developed by the county department of social services or a licensed child-placing agency for a permanent placement relative to the child's best interest and the efforts of the department or agency to implement such plan;
 - (2) Whether the child has been listed for adoptive placement with the North Carolina Adoption Resource Exchange, the

North Carolina Photo Adoption Listing Service (PALS), or any other specialized adoption agency; and

(3) The efforts previously made by the department or agency to find a permanent home for the child.

(d) The court, after making findings of fact, shall affirm the county department's or child-placing agency's plans or require specific additional steps which are necessary to accomplish a permanent placement which is in the best interests of the child.

(e) If the child has been placed for adoption prior to the date scheduled for the review, written notice of said placement shall be given to the clerk to be placed in the court file and the review hearing shall be cancelled, with notice of said cancellation given by the clerk to all persons previously notified.

(f) The process of selection of specific adoptive parents shall be the responsibility of and within the discretion of the county department of social services or licensed child-placing agency. The guardian ad litem may request information from and consult with the county department or child-placing agency concerning the selection process. If the guardian ad litem requests information about the selection process, the county shall provide the information within five days. Any issue of abuse of discretion by the county department or child-placing agency in the selection process must be raised by the guardian ad litem within 10 days following the date the agency notifies the court and the guardian ad litem in writing of the filing of the adoption petition. (1983, c. 607, s. 1; 1993, c. 537, s. 2.)

Effect of Amendments. — The 1993 amendment, effective January 1, 1994, and applicable to petitions filed and re-

quests for information made on or after that date, inserted the third sentence of subsection (f).

§ 7A-660. Review of agency's plan for child placement.

(a) The director of social services or the director of the licensed private child-placing agency shall promptly notify the clerk to calendar the case for review of the department's or agency's plan for the child at a session of court scheduled for the hearing of juvenile matters in any case where:

(1) One parent has surrendered a child for adoption under the provisions of G.S. 48-9(a)(1) and the termination of parental rights proceedings have not been instituted against the non-surrendering parent within six months of the surrender by the other parent, or

(2) Both parents have surrendered a child for adoption under the provisions of G.S. 48-9(a)(1) and that child has not been placed for adoption within six months from the date of the more recent parental surrender.

(b) In any case where an adoption is dismissed or withdrawn and the child returns to foster care with a department of social services or a licensed private child-placing agency, then the department of social services or licensed child-placing agency shall notify the clerk within 30 days from the date the child returns to care to calendar the case for review of the agency's plan for the child at a session of court scheduled for the hearing of juvenile matters.

(c) Notification of the court required under subsections (a) or (b) of this section shall be by a petition for review. The petition shall

set forth the circumstances necessitating the review under subsections (a) or (b). The review shall be conducted within 30 days following the filing of the petition for review unless the court shall otherwise direct. The court shall conduct reviews every six months until the child is placed for adoption and the adoption petition is filed by the adoptive parents. The initial review and all subsequent reviews shall be conducted pursuant to G.S. 7A-659. (1983, c. 607, s. 2; 1993, c. 537, s. 4.)

Effect of Amendments. — The 1993 amendment, effective January 1, 1994, and applicable to petitions filed and re-

quests for information made on or after that date, substituted "30 days" for "six months" in subsection (b).

§ 7A-661. Review of voluntary foster care placements.

(a) The court shall review the placement of any juvenile in foster care made pursuant to a voluntary agreement between the juvenile's parents or guardian and a county department of social services and shall make findings from evidence presented at a review hearing with regard to:

- (1) The voluntariness of the placement;
- (2) The appropriateness of the placement;
- (3) Whether the placement is in the best interests of the juvenile; and
- (4) The services that have been or should be provided to the parents, guardian, foster parents, and juvenile, as the case may be, either (i) to improve the placement or (ii) to eliminate the need for the placement.

(b) The court may approve the continued placement of the juvenile in foster care on a voluntary agreement basis, disapprove the continuation of the voluntary placement, or direct the department of social services to petition the court for legal custody if the placement is to continue.

(c) An initial review hearing shall be held not more than 180 days after the juvenile's placement and shall be calendared by the clerk for hearing within such period upon timely request by the director of social services. Additional review hearings shall be held at such times as the court shall deem appropriate and shall direct, either upon its own motion or upon written request of the parents, guardian, foster parents or director of social services. A child placed under a voluntary agreement between the juvenile's parent or guardian and the county department of social services shall not remain in placement more than 12 months without the filing of a petition alleging abuse, neglect, or dependency.

(d) The clerk shall give at least 15 days advance written notice of the initial and subsequent review hearings to the parents or guardian of the juvenile, to the juvenile if 12 or more years of age, to the director of social services, and to any other persons whom the court may specify. (1985, c. 459, s. 1; 1993, c. 537, s. 3.)

Effect of Amendments. — The 1993 amendment, effective January 1, 1994, and applicable to petitions filed and re-

quests for information made on or after that date, added the last sentence of subsection (c).

ARTICLE 53.

*Modification and Enforcement of Dispositional Orders; Appeals.***§ 7A-664. Authority to modify or vacate.**

CASE NOTES

Cited in In re Phillips, 99 N.C. App. 159, 392 S.E.2d 407 (1990).

§ 7A-665. Request for modification for lack of suitable services.

CASE NOTES

The onus is clearly on the Division of Youth Services to alert the court whenever it finds "that any juvenile committed to its care is not suitable for its program." In re Doe, 329 N.C. 743, 407 S.E.2d 798 (1991).

§ 7A-666. Right to appeal.

CASE NOTES

Applied in In re Hayes, 106 N.C. App. 652, 418 S.E.2d 304 (1992).

§ 7A-668. Disposition pending appeal.

CASE NOTES

Cited in In re Cowles, 108 N.C. App. 74, 422 S.E.2d 443 (1992); In re Safriet, 112 N.C. App. 747, 436 S.E.2d 898 (1993).

ARTICLE 54.

*Juvenile Records and Social Reports.***§ 7A-675. Confidentiality of records.**

(a) The clerk of superior court shall maintain a complete record of all juvenile cases filed in the clerk's office to be known as the juvenile record, which shall be withheld from public inspection and, except as provided in this subsection, may be examined only by order of the judge. The record shall include the summons, petition, custody order, court order, written motions, the electronic or mechanical recording of the hearing, and other papers filed in the proceeding. The recording of the hearing shall be reduced to a written transcript only when notice of appeal has been timely given. After the time for appeal has expired with no appeal having been

filed, the recording of the hearing may be erased or destroyed upon the written order of the judge.

The following persons may examine the juvenile's record without an order of the judge:

- (1) The juvenile, the juvenile's parent, guardian, or custodian, or another authorized representative of the juvenile.
- (2) The prosecutor in a subsequent criminal proceeding against the juvenile.

The juvenile's record of an adjudication of delinquency for an offense that would be a Class A, B, C, D, or E felony if committed by an adult may be used in a subsequent criminal proceeding against the juvenile either under G.S. 8C-1, Rule 404(b), or to prove an aggravating factor at sentencing under G.S. 15A-1340.4(a), G.S. 15A-1340.16(d), or G.S. 15A-2000(e). The record may be so used only by order of the judge in the subsequent criminal proceeding, upon motion of the prosecutor, after an in camera hearing to determine whether the record in question is admissible.

(b) The Chief Court Counselor shall maintain a record of the cases of juveniles under supervision by court counselors which shall include family background information; reports of social, medical, psychiatric, or psychological information concerning a juvenile or his family; a record of the probation reports of a juvenile; interviews with his family; or other information which the judge finds should be protected from public inspection in the best interest of the juvenile.

(c) The Director of the Department of Social Services shall maintain a record of the cases of juveniles under protective custody by his Department or under placement by the court. This file shall include material similar in nature to that described in subsection (b).

(d) The records maintained pursuant to subsections (b) and (c) may be examined only by order of the judge except that the juvenile shall have the right to examine them.

(e) Law-enforcement records and files concerning a juvenile shall be kept separate from the records and files of adults except in proceedings when jurisdiction of a juvenile is transferred to superior court. Law-enforcement records and files concerning juveniles shall be open only to the inspection of the prosecutor, court counselors, the juvenile, his parent, guardian, and custodian.

(f) All records and files maintained by the Division of Youth Services shall be withheld from public inspection and shall be open only to the inspection of the juvenile, professionals in that agency who are directly involved in the juvenile's case, and court counselors. The judge authorizing commitment of a juvenile shall have the right to inspect and order the release of records maintained by the Division of Youth Services on that juvenile.

(g) Disclosure of information concerning any juvenile under investigation or alleged to be within the jurisdiction of the court that would reveal the identity of that juvenile is prohibited except that publication of pictures of runaways is permitted with the permission of the parents.

(h) Nothing in this section shall preclude the necessary sharing of information among authorized agencies.

(i) In the case of a child victim, a judge may order the sharing of information among such public agencies as the judge deems neces-

sary to reduce the trauma to the child victim. (1979, c. 815, s. 1; 1987, c. 297; 1994, Ex. Sess., c. 7, s. 1.)

Effect of Amendments. — The 1994 Extra Session amendment, effective May 1, 1994, and applicable to offenses committed on or after that date, in subsection (a) in the first sentence substituted “the clerk’s office” for “his office,” inserted “except as provided in this sub-

section,” and deleted “except that the juvenile, his parent, guardian, custodian, or other authorized representative of the juvenile shall have a right to examine the juvenile’s record”; and added the second and third paragraphs of subsection (a).

§ 7A-676. Expunction of records of juveniles alleged or adjudicated delinquent and undisciplined.

(a) Any person who has attained the age of 16 years may file a petition in the court where the person was adjudicated undisciplined for expunction of all records of that adjudication.

(b) Any person who has attained the age of 16 years may file a petition in the court where the person was adjudicated delinquent for expunction of all records of that adjudication provided:

(1) The offense for which the person was adjudicated would have been a crime other than a Class A, B, C, D, or E felony if committed by an adult.

(2) The person has not subsequently been adjudicated delinquent or convicted as an adult of any felony or misdemeanor other than a traffic violation under the laws of the United States or the laws of this State or any other state.

Records relating to an adjudication for an offense that would be a Class A, B, C, D, or E felony if committed by an adult shall not be expunged.

(c) The petition shall contain, but not be limited to, the following:

(1) An affidavit by the petitioner that he has been of good behavior since the adjudication and, in the case of a petition based on a delinquency adjudication, that he has not subsequently been adjudicated delinquent or convicted as an adult of any felony or misdemeanor other than a traffic violation under the laws of the United States, or the laws of this State or any other state;

(2) Verified affidavits of two persons, who are not related to the petitioner or to each other by blood or marriage, that they know the character and reputation of the petitioner in the community in which he lives and that his character and reputation are good;

(3) A statement that the petition is a motion in the cause in the case wherein the petitioner was adjudicated delinquent or undisciplined.

The petition shall be served upon the district attorney in the district wherein adjudication occurred. The district attorney shall have 10 days thereafter in which to file any objection thereto and shall be duly notified as to the date of the hearing on the petition.

(d) If the judge, after hearing, finds that the petitioner satisfies the conditions set out in subsections (a) or (b), he shall order and direct the clerk of superior court and all law-enforcement agencies

to expunge their records of the adjudication including all references to arrests, complaints, referrals, petitions, and orders.

(e) The clerk of superior court shall forward a certified copy of the order to the sheriff, chief of police, or other law-enforcement agency.

(f) Records of a juvenile adjudicated delinquent or undisciplined being maintained by the Chief Court Counselor, an intake counselor or a court counselor shall be retained or disposed of as provided by the Juvenile Services Division.

(g) Records of a juvenile adjudicated delinquent or undisciplined being maintained by personnel at a residential facility operated by the Division of Youth Services, shall be retained or disposed of as provided by the Department of Human Resources.

(h) Any juvenile or any person who has attained the age of 16 years may file a petition in the court in which he was alleged to be delinquent or undisciplined for expunction of all juvenile records of his having been alleged to be delinquent or undisciplined if the court dismissed the juvenile petition without an adjudication that the juvenile was delinquent or undisciplined. The petition shall be served on the chief court counselor in the district where the juvenile petition was filed. The chief court counselor shall have 10 days thereafter in which to file a written objection in the court. If no objection is filed, the judge may grant the petition without a hearing. If an objection is filed or the judge so directs, a hearing shall be scheduled and the chief court counselor shall be notified as to the date of the hearing. If the judge finds at the hearing that the petitioner satisfies the conditions specified herein, the judge shall order the clerk of superior court and the appropriate law enforcement agencies to expunge their records of the allegations of delinquent or undisciplined acts including all references to arrests, complaints, referrals, juvenile petitions, and orders. The clerk of superior court shall forward a certified copy of the order of expunction to the sheriff, chief of police, or other appropriate law enforcement agency, and to the chief court counselor, and these specified officials shall immediately destroy all records relating to the allegations that the juvenile was delinquent or undisciplined. (1979, c. 815, s. 1; 1989, c. 186; 1994, Ex. Sess., c. 7, s. 2.)

Effect of Amendments. —

The 1994 Extra Session amendment, effective May 1, 1994, and applicable to offenses committed on or after that date, substituted "the person" for "he" preceding "was adjudicated" in the introduc-

tory language of subsection (b); substituted "the person" for "he" preceding "was adjudicated" in subdivision (b)(1); and added the last sentence of subsection (b).

ARTICLE 58.

*Juvenile Law Study Commission.***§ 7A-740. Creation; members; terms; qualifications; vacancies.**

(a) The Juvenile Law Study Commission is hereby created. It shall consist of 18 voting members, 14 to be appointed by the Governor, two by the President Pro Tempore of the Senate, and two by the Speaker of the House of Representatives. The members appointed by the President Pro Tempore of the Senate shall be members of the Senate at the time of their appointment; the members appointed by the Speaker of the House of Representatives shall be members of the House of Representatives at the time of their appointment. Of the members appointed by the Governor, two shall be district court judges, one from an urban district, one from a rural. Three shall be a chief court counselor and two court counselors representing the Intake Division, one from an urban district, one from a rural. Two shall be from Social Services, one from the State level and one from the county. One shall be from the Division of Youth Services. One shall be from a local facility of Community Based Alternatives. One shall be a youth member representing the youth of the State who shall be a person under the age of 21 at the time of the appointment, who shall serve for one year. One shall be a State or local representative of the Guardian Ad Litem Services of the Administrative Office of the Courts, who shall serve for two years. One shall be from Law Enforcement. One shall be from the North Carolina Juvenile Detention Association. One shall be the member of the Juvenile Justice Planning Committee of the Governor's Crime Commission recommended for appointment by the Juvenile Justice Planning Committee and shall serve for three years. The district court judges and the Social Services members shall serve for three years. The chief court counselor and the court counselors shall serve for two years. The representatives from the Division of Youth Services, Law Enforcement, Community Based Alternatives, and the Juvenile Detention Association shall serve for one year. The legislative members shall serve for two-year terms. All initial terms shall begin July 1, 1980.

(b) A vacancy in membership shall be filled by the appointing authority who made the initial appointment. When the members' terms expire, their successors shall serve for the same length of time their predecessors served. A member whose term expires may be reappointed. If, when a term expires, the appointing authority has not filled the vacancy, the member whose term has expired shall continue to serve until the appointment is made. (1979, 2nd Sess., c. 1283, s. 1; 1981 (Reg. Sess., 1982), c. 1189, s. 1; 1985, c. 669, ss. 1-4; 1985 (Reg. Sess., 1986), c. 898; 1989, c. 367; 1991, c. 739, s. 8.)

Editor's Note. — Session Laws 1991, c. 739, which amended this section, in s. 34 provided: "This act applies to any appointments for terms beginning on or after January 1, 1993, and also applies to the filling of any unexpired terms where

the term began before that date but the vacancy occurs on or after that date." See the "Effect of Amendments" note.

Effect of Amendments. —

The 1991 amendment, applicable to any appointments for terms beginning

on or after January 1, 1993, and to the filling of unexpired terms where the vacancy is on or after that date, designated

subsections (a) and (b), and inserted "Pro Tempore" in the second and third sentences of subsection (a).

SUBCHAPTER XII. ADMINISTRATIVE HEARINGS.

ARTICLE 60.

Office of Administrative Hearings.

§ 7A-750. Creation; status; purpose.

Editor's Note. —

Session Laws 1991, c. 103 amends Session Laws 1985, c. 746, s. 19, as noted in the main volume under this section, by

deleting the January 1, 1992, sunset provision. Therefore, this Article remains in effect.

CASE NOTES

Cited in Ford v. North Carolina Dep't of Env't, Health, & Natural Resources,

107 N.C. App. 192, 419 S.E.2d 204 (1992).

§ 7A-751. Agency head; powers and duties.

Editor's Note. —

Session Laws 1991, c. 103 amends Session Laws 1985, c. 746, s. 19, as noted in the main volume under this section, by

deleting the January 1, 1992, sunset provision. Therefore, this Article remains in effect.

CASE NOTES

Cited in Ford v. North Carolina Dep't of Env't, Health, & Natural Resources,

107 N.C. App. 192, 419 S.E.2d 204 (1992).

§ 7A-752. Chief Administrative Law Judge; appointments; vacancy.

Editor's Note. —

Session Laws 1991, c. 103 amends Session Laws 1985, c. 746, s. 19, as noted in the main volume under this section, by

deleting the January 1, 1992, sunset provision. Therefore, this Article remains in effect.

CASE NOTES

Cited in Ford v. North Carolina Dep't of Env't, Health, & Natural Resources,

107 N.C. App. 192, 419 S.E.2d 204 (1992).

§ 7A-753. Additional administrative law judges; appointment; specialization.

Editor's Note. —

Session Laws 1991, c. 103 amends Session Laws 1985, c. 746, s. 19, as noted in the main volume under this section, by

deleting the January 1, 1992, sunset provision. Therefore, this Article remains in effect.

CASE NOTES

Cited in *Ford v. North Carolina Dep't of Env't, Health, & Natural Resources*,

107 N.C. App. 192, 419 S.E.2d 204 (1992).

§ 7A-754. Qualifications; standards of conduct; removal.

Editor's Note. —

Session Laws 1991, c. 103 amends Session Laws 1985, c. 746, s. 19, as noted in the main volume under this section, by

deleting the January 1, 1992, sunset provision. Therefore, this Article remains in effect.

CASE NOTES

Cited in *Ford v. North Carolina Dep't of Env't, Health, & Natural Resources*,

107 N.C. App. 192, 419 S.E.2d 204 (1992).

§ 7A-755. Expenses reimbursed.

Editor's Note. —

Session Laws 1991, c. 103 amends Session Laws 1985, c. 746, s. 19, as noted in the main volume under this section, by

deleting the January 1, 1992, sunset provision. Therefore, this Article remains in effect.

§ 7A-756. Power to administer oaths and issue subpoenas.

Editor's Note. —

Session Laws 1991, c. 103 amends Session Laws 1985, c. 746, s. 19, as noted in the main volume under this section, by

deleting the January 1, 1992, sunset provision. Therefore, this Article remains in effect.

§ 7A-757. Temporary administrative law judges; appointments; powers and standards; fees.

Editor's Note. —

Session Laws 1991, c. 103 amends Session Laws 1985, c. 746, s. 19, as noted in the main volume under this section, by

deleting the January 1, 1992, sunset provision. Therefore, this Article remains in effect.

§ 7A-758. Availability of administrative law judge to exempt agencies.

Editor's Note. —

Session Laws 1991, c. 103 amends Session Laws 1985, c. 746, s. 19, as noted in the main volume under this section, by

deleting the January 1, 1992, sunset provision. Therefore, this Article remains in effect.

§ 7A-759. Role as deferral agency.

(a) The Office of Administrative Hearings is designated to serve as the State's deferral agency for cases deferred by the Equal Employment Opportunity Commission to the Office of Administrative Hearings as provided in Section 706 of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5, the Age Discrimination in Employment Act, 29 U.S.C. § 621 et seq., and the Americans with Disabilities Act, 42 U.S.C. § 12101 et seq. for charges filed by State or local government employees covered under Chapter 126 of the General Statutes and shall have all of the powers and authority necessary to function as a deferral agency.

(b) The Chief Administrative Law Judge is authorized and directed to contract with the Equal Employment Opportunity Commission for the Office of Administrative Hearings to serve as a deferral agency and to establish and maintain a Civil Rights Division in the Office of Administrative Hearings to carry out the functions of a deferral agency.

(c) In investigating charges an employee of the Civil Rights Division of the Office of Administrative Hearings specifically designated by an order of the Chief Administrative Law Judge filed in the pending case may administer oaths and affirmations.

(d) Any charge not resolved by informal methods of conference, conciliation or persuasion shall be heard as a contested case as provided in Article 3 of Chapter 150B of the General Statutes.

(e) Notwithstanding G.S. 150B-34 and G.S. 150B-36, an order entered by an administrative law judge after a contested case hearing on the merits of a deferred charge is a final agency decision and is binding on the parties. The administrative law judge may order whatever remedial action is appropriate to give full relief consistent with the requirements of federal statutes or regulations.

(f) In addition to the authority vested in G.S. 7A-756 and G.S. 150B-33, an administrative law judge may monitor compliance with any negotiated settlement, conciliation agreement or order entered in a deferred case.

(g) The standards of confidentiality established by federal statute or regulation for discrimination charges shall apply to deferred cases investigated or heard by the Office of Administrative Hearings.

(h) Nothing in this section shall be construed as limiting the authority or right of any federal agency to act under any federal statute or regulation. (1987 (Reg. Sess., 1988), c. 1111, s. 14(c); 1993, c. 234, s. 1.)

Effect of Amendments. — The 1993 amendment, effective October 1, 1993, inserted "et seq., and the Americans with Disabilities Act, 42 U.S.C. § 12101

et seq." following "Age Discrimination in Employment Act, 29 U.S.C. § 621" and made related changes.

SUBCHAPTER XIII. COMMUNITY PENALTIES PROGRAM.

ARTICLE 61.

Community Penalties Program Act of 1983.

§ 7A-770. Purpose.

This Article shall be known and may be cited as the "Community Penalties Act of 1983." The purpose of this Article is to reduce prison overcrowding by providing the judicial system with community sentences to be used in lieu of and at less cost than imprisonment. In furtherance of this purpose, this Article provides for the following:

- (1) Establishment of local sentencing alternatives for felons who require less than institutional custody but more than regular probation supervision.
- (2) Increased opportunities for certain felons to make restitution to victims of crime through financial reimbursement or community service.
- (3) Local involvement in the development of community penalties to assure that they are specifically designed to meet local needs.
- (4) Reduced expenditures of State funds through an emphasis on alternative penalties for offenders so that new prisons need not be built or new space added. (1983, c. 909, s. 1; 1991, c. 566, ss. 2, 3.)

Editor's Note. —

Session Laws 1991, c. 566, which amended this section, in s. 1 provides: "Notwithstanding the provisions of Section 130 of Chapter 1066 of the 1989 Session Laws, the statutory authority, powers, duties, and functions, records, personnel, property, unexpended balances of appropriations, allocations or other funds, including the functions of budgeting and purchasing, of the Department of Crime Control and Public Safety to conduct the community penalties program, as provided by Part 6 of Article 11 of Chapter 143B of the General Statutes, are transferred to the Administrative Office of the Courts.

"The transfer directed by this section shall include two community specialists I, position numbers 4971-0000-0009-120 and 4971-0000-0009-232, and one clerk-typist IV, position number 4971-0000-0009-202. The Office of State Budget and Management shall ensure that the transfer directed by this section is carried out."

This Subchapter is former Part 6 of Article 11 of Chapter 143B as rewritten by Session Laws 1991, c. 566, s. 2, and recodified. Where appropriate, the historical citations to the section in the former part have been added to the corresponding sections in the subchapter as rewritten and recodified. References to "this Part" have been changed to "this Article".

Session Laws 1991, c. 566, s. 8 provides that "Rules adopted by the Department of Crime Control and Public Safety that are in effect on the effective date of this act apply to the Administrative Office of the Courts until amended or repealed by the Administrative Office of the Courts."

Effect of Amendments. — Session Laws 1991, c. 566, s. 3, effective July 1, 1991, amended § 143B-500, as recodified as this section, by substituting "certain felons" for "nonviolent felons" in subdivision (2). In addition, the act changed references to "the Secretary" to "the Director."

§ 7A-771. Definitions.

As used in this Article:

- (1) "Community penalties program" means an agency within the judicial district which shall (i) prepare community penalty plans; (ii) arrange or contract with public and private agencies for necessary services for offenders; and (iii) monitor the progress of offenders placed on community penalty plans.
- (2) "Community penalty plan" means a plan presented in writing to the sentencing judge which provides a detailed description of the targeted offender's proposed community penalty.
- (2a) "Director" means the Director of the Administrative Office of the Courts.
- (3) "Judicial district" means a district court district as defined in G.S. 7A-133.
- (4) Repealed by Session Laws 1991, c. 566, s. 4, effective July 1, 1991.
- (5) "Targeted offenders" means persons convicted of misdemeanors or felonies who are eligible to receive an intermediate punishment based on their class of offense and prior record level and who are facing an imminent and substantial threat of imprisonment. (1983, c. 909, s. 1; 1989, c. 770, s. 58; 1991, c. 566, ss. 2, 4; 1993 (Reg. Sess., 1994), c. 767, s. 14.)

Editor's Note. — Session Laws 1993 (Reg. Sess., 1994), c. 767, which amended this section, in s. 34 provides: "Prosecution for, or sentences based on, offenses occurring before the effective date of this act are not abated or affected by the repeal or amendment in this act of any statute, and the statutes that would be applicable to those prosecutions or sentences but for the provisions of this act remain applicable to those prosecutions or sentences."

Session Laws 1993 (Reg. Sess., 1994), c. 769, s. 43.2 provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 1994-95 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 1994-95 fiscal year."

Session Laws 1993 (Reg. Sess., 1994), c. 769, s. 24.1(a) and (b) provide: "(a) Of the funds appropriated from the General Fund to the Judicial Department for the 1994-95 fiscal year to conduct the community penalties program, the sum of three million five hundred thirteen thousand and six hundred fifty-eight dollars (\$3,513,658) may be allocated by the Judicial Department in any amount among existing community penalties

programs, including any State-operated programs, or may be used to establish new State-operated community penalties programs, notwithstanding the provisions of G.S. 7A-771 and G.S. 7A-772.

Session Laws 1993 (Reg. Sess., 1994), c. 769, s. 2 provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 1994.'"

"(b) The Judicial Department shall report annually to the Senate and House Appropriations Subcommittees on Justice and Public Safety and to the Fiscal Research Division on the administrative expenditures of the community penalties programs. The Judicial Department shall report quarterly to the Joint Legislative Commission on the Governmental Operations on any elimination or reduction of funding for existing community penalties programs."

Effect of Amendments. —

Session Laws 1991, c. 566, s. 4, effective July 1, 1991, amended § 143B-501, as recodified as this section by adding subdivision (2a), repealing former subdivision (4) which read: "'Secretary' means the Secretary of the Department of Crime Control and Public Safety", and in subdivision (5), substituting "misdemeanors, Class H felonies other

than involuntary manslaughter, or Class I or J felonies, who would be eligible for intensive probation or house arrest, and" for "nonviolent misdemeanors or nonviolent Class H, I, or J felonies." In addition, the act changed references to "the Secretary" to "the Director."

The 1993 (Reg. Sess., 1994) amendment, effective October 1, 1994, substituted "misdemeanors or felonies who are

eligible to receive an intermediate punishment based on their class of offense and prior record level" for "misdemeanors, Class H felonies other than involuntary manslaughter, or Class I or J felonies, who would be eligible for intensive probation or house arrest" in subdivision (5).

§ 7A-772. Allocation of funds.

The Director may award grants in accordance with the policies established by this Article and in accordance with any laws made for that purpose, including appropriations acts and provisions in appropriations acts, and adopt regulations for the implementation, operation, and monitoring of community penalties programs. Community penalties programs that are grantees shall use such funds to develop, implement, and monitor community penalty plans. Grants shall be awarded by the Director to agencies whose comprehensive program plans promise best to meet the goals set forth herein. (1983, c. 909, s. 1; 1991, c. 566, ss. 2, 5.)

Editor's Note. — Session Laws 1993 (Reg. Sess., 1994), c. 769, s. 43.2 provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 1994-95 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 1994-95 fiscal year."

Session Laws 1993 (Reg. Sess., 1994), c. 769, s. 24.1(a) and (b) provide: "(a) Of the funds appropriated from the General Fund to the Judicial Department for the 1994-95 fiscal year to conduct the community penalties program, the sum of three million five hundred thirteen thousand and six hundred fifty-eight dollars (\$3,513,658) may be allocated by the Judicial Department in any amount among existing community penalties programs, including any State-operated programs, or may be used to establish new State-operated community penalties programs, notwithstanding the provisions of G.S. 7A-771 and G.S. 7A-772.

Session Laws 1993 (Reg. Sess., 1994), c. 769, s. 2 provides: "This act shall be

known as 'The Current Operations and Capital Improvements Appropriations Act of 1994.'"

"(b) The Judicial Department shall report annually to the Senate and House Appropriations Subcommittees on Justice and Public Safety and to the Fiscal Research Division on the administrative expenditures of the community penalties programs. The Judicial Department shall report quarterly to the Joint Legislative Commission on the Governmental Operations on any elimination or reduction of funding for existing community penalties programs."

Effect of Amendments. — Session Laws 1991, c. 566, s. 5, effective July 1, 1991, amended § 143B-502, as recodified as this section, in the first sentence by substituting "Director" for "Secretary", substituting "in accordance with any laws" for "within the limits of any appropriation", inserting "including appropriations acts and provisions in appropriations acts", and substituting "Director" for "Secretary" in the last sentence.

§ 7A-773. Responsibilities of a community penalties program.

A community penalties program shall be responsible for:

- (1) Targeting offenders who are eligible to receive an intermediate punishment based on their class of offense and prior record level and who face an imminent and substantial threat of imprisonment.
- (2) Preparing detailed community penalty plans for presentation to the sentencing judge by the offender's attorney.
- (3) Contracting or arranging with public or private agencies for services described in the community penalty plan.
- (4) Monitoring the progress of offenders under community penalty plans. (1983, c. 909, s. 1; 1991, c. 566, s. 2; 1993 (Reg. Sess., 1994), c. 767, s. 15.)

Editor's Note. — Session Laws 1993 (Reg. Sess., 1994), c. 767, which amended this section, in s. 34 provides: "Prosecution for, or sentences based on, offenses occurring before the effective date of this act are not abated or affected by the repeal or amendment in this act of any statute, and the statutes that would be applicable to those prosecutions or sentences but for the provisions

of this act remain applicable to those prosecutions or sentences."

Effect of Amendments. —

The 1993 (Reg. Sess., 1994) amendment, effective October 1, 1994, inserted "are eligible to receive an intermediate punishment based on their class of offense and prior record level and who" in subdivision (1).

§ 7A-774. Requirements for a comprehensive community penalties program plan.

Agencies applying for grants shall prepare a comprehensive community penalties program plan for the development, implementation, operation, and improvement of a community penalties program for the judicial district, as prescribed by the Director. Such plan shall include:

- (1) Objectives of the community penalties program.
- (2) Goals for reduction of offenders committed to prison for each county within the district, and a system of monitoring the number of commitments to prison.
- (3) Procedures for identifying targeted offenders, and a plan for referral of targeted offenders to the community penalties program.
- (4) Procedures for preparing and presenting community penalty plans to the court.
- (5) Procedures for obtaining services from existing public or private agencies, and a detailed budget for staff, contracted services, and all other costs.
- (6) Procedures for monitoring the progress of offenders on community penalty plans and for cooperating with the probation personnel who have supervisory responsibility for the offender.
- (7) Procedures for returning offenders who do not comply with their community penalty plan to court for action by the court.
- (8) Procedures for evaluating the program's effect on numbers of prison commitments. (1983, c. 909, s. 1; 1991, c. 566, ss. 2, 7.)

Effect of Amendments. — Session 1991, substituted "Director" for "Secretary" in the introductory paragraph.

§ 7A-775. Community penalties board.

Each community penalties program shall establish a community penalties board to provide direction and assistance to the community penalties program in the implementation and evaluation of the plan. Community penalties boards may be organized as nonprofit corporations under Chapter 55A of the General Statutes. The community penalties board shall consist of not less than 12 members, and shall include, insofar as possible, judges, district attorneys, attorneys, social workers, law-enforcement officers, probation officers, and other interested persons. The community penalties board shall meet on a regular basis, and its duties include, but are not limited to, the following:

- (1) Development of an annual budget for the program;
 - (2) Hiring, firing, and evaluation of program personnel;
 - (3) Selection of board members;
 - (4) Arranging for a private and independent annual audit;
 - (5) Development of procedures for contracting for services.
- (1983, c. 909, s. 1; 1991, c. 566, ss. 2, 6.)

Effect of Amendments. — Session 1991, c. 566, s. 6, effective July 1, 1991, amended § 143B-505, as recodified as this section, by rewriting this section.

§ 7A-776. Limitation on use of funds.

Funds provided for use under the provisions of this Article shall not be used for the operating costs, construction, or any other costs associated with local jail confinement. (1983, c. 909, s. 1; 1991, c. 566, s. 2.)

§ 7A-777. Evaluation.

The Director shall evaluate each community penalties program on an annual basis to determine the degree to which the prison commitments have been reduced or have kept from increasing as a result of the community penalties program. The Director shall not renew or continue a program that has failed to affect commitments and that shows no promise of doing so in the future, after allowing for changes in the number of convictions. (1983, c. 909, s. 1; 1991, c. 566, ss. 2, 7.)

Effect of Amendments. — Session 1991, c. 566, s. 7, substituted "Director" for "Secretary" in two places.

STATE OF NORTH CAROLINA

DEPARTMENT OF JUSTICE

Raleigh, North Carolina

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I, Michael F. Easley, Attorney General of North Carolina, do hereby certify that the foregoing 1994 Cumulative Supplement to the General Statutes of North Carolina was prepared and published by The Michie Company under the supervision of the Department of Justice of the State of North Carolina.

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Attorney General of North Carolina

